APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

—against—

JOSEPH A. CALIFANO, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1978
CERTIORARI GRANTED FEBRUARY 20, 1979

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Relevant Docket Entries

UNITED STATES DISTRICT COURT

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, IRVING ANKER, Chancellor of the City School District of the City of New York; COMMUNITY SCHOOL BOARDS OF COMMUNITY SCHOOL DISTRICTS 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29, and 30, 32,

Plaintiffs,

—against—

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare; DAVID S. TATEL, Office for Civil Rights, United States Department of Health, Education and Welfare,

Defendants.

28 USC 1346

Application for a preliminary and permanent injunction against denial of pltff's application for funds under the Emergency Cause School Aid Act, 20 USC 1601 et seq. & 45 CFR 185.01 et seq.

SEEKS—$17.5 million

For Pltff.:
W. BERNARD RICHLAND
Corporation Counsel
Municipal Building
NY, NY 10007
(566-2183/2192)

by Rosemary Carroll

Relevant Docket Entries

DATE	PROCEEDINGS
9-27-77	Complaint filed, summons issued.
9-29-77	By WEINSTEIN J.—Order to show cause filed returnable 10/6/77 at 4:00 p.m. for an order why an order should not issue rescinding defts denial of pltff's application for funding under the Emergency School Aid Act and declaring such denial to be violative of that act, etc. tk
10- 3-77	Letter dtd 11/9/76 filed re OCR to Chancellor Anker filed. jj
10- 3-77	Memo of understanding between Bd of Educa. and the OCR office filed. jj
10- 3-77	Pltff's exhibits in support of preliminary injunction filed. jj
10- 6-77	Before Weinstein, J—case called trial adjd to 10/31/77, jj
10- 7-77	By WEINSTEIN, J.—Consent order dtd 10-6-77 filed that parties will move for summary judgment on 10-31-77 and that TRO shall remain in full force until decision on the motion. ld
10-31-77	Before Weinstein, J.—Case called. Both sides present. Pltff's motion to to strike deft exhibits 13, 14, 18, 19, 20, & 21 from administrative record denied. Govt's motion for summary judgement argued and granted. Court grants city's motion for summary judgement as to District 11. Dist. 11 to furnish such such supplemental information that HEW may require. TRO continued and extended 10 Days. If court decides against city on submission of briefs, judgement to be stayed pending city's appeal. Govt to submit order. jm

Relevant Docket Entries

DATE	PROCEEDINGS
10-31-77	Pltff's response to deft's 9G statement and deft's 9G statement filed, dtd 10/30/77. jm
10-31-77	Affidavit of R. Carroll, filed. jm
11- 1-77	By WEINSTEIN, J.—Order dtd. 10-31-77 that pltff's motion for summary judgment is granted and that defts motion for summary judgment is granted and that the TRO dtd. 10-6-77 is hereby extended 10 days from date of this order and that a motion for reconsideration may be made within 10 days of this order filed.
11- 3-77	Affidavit in support of defts motion for summary judgment filed.
11- 3-77	Notice of motion ret. 10-31-77 for summary judgment with memo of law filed.
11- 3-77	Notice of motion ret. 10-31-77 with affidavit of D. Tatel, N. Cicchetti and rule 9 g statement filed, with exhibits attached filed fy
11- 7-77	Memo of law in support of defts motion for summary judgment filed. fy
11-10-77	Before WEINSTEIN, J.—Case called for hearing. Hearing held and TRO extended pending decision of Court fy
11-17-77	Letter dtd 11-14-77 to J. Weinstein from Rosemary Carroll re typographical error in the Cicchetti affidavit of 11-9-77, paragraph 4 filed. mg

DATE	PROCEEDINGS
11-18-77	By WEINSTEIN, J.—Memo and order remanding the case to HEW for further consideration and no costs or disbursements are to be allowed and a stay of this order and a continuance of the prior restraining order for thirty days is granted to permit application to the Court of Appeals filed. fy
11-22-77	Stenographers Transcript dated 11/10/77 filed.
12-19-77	Letter of Rosemary Carroll (Asst. Corp. Counsel) to WEINSTEIN, J. dtd 12/16/77. IN RE: Hearing on the BOARD's application will be held on 1/3/78 pursuant to YOUR decision and Order of 11/18/77 filed. lg.
12-21-77	Before WEINSTEIN, J.—Case called. Hearing held on order to show cause. Court ruled that City can provide its own court reporter for administrative hearing before H.E.W.—Stay continued until five days after HEW makes its determination. mm
12-22-77	By WEINSTEIN, J.—Order to show cause ret 12-21-77 filed. mm
12-22-77	Letter from Richard P. Caro dtd 12-19-77 filed. mm
12-27-77	By WEINSTEIN, J.—Order dtdl 12-23-77 restraining deft from distributing 3.8 million dollars in ESAA funds etc., see order filed. fy

DATE	PROCEEDINGS
4-11-78	By WEINSTEIN, J.—Order to show cause ret 4-12-78 at 2 PM for an order rescinding deft's denial of pltffs' application for funding, etc without TRO and without proof of service filed. Amended complaint filed. fy
4-12-78	NYC's memo of law in support of application for perliminary injunction filed. fy
4-12-78	Before WEINSTEIN, J.—Case called. Pltff's motion for TRO argued a denied. On application of govt., motion for summary judgement Gr Orde-r stayed until tues 4/18/78 @ 5 PM to permit time to appeal. jm
4-14-78	Letter dtd. 4-13-78 from R. Carroll to J. Weinstein re: notice of settlement for 4-18-78 filed. fy
4-18-78	Declaration of USA with documents attached re: added to administr record filed. fy
4-19-78	By WEINSTEIN, J.—Order dtd 4/18/78 denying pltff's application for TRO and for judgement reversing defts decision finding pltffs ineligible for ESAA funds, and other relief, etc, etc, see order filed. jm (clerk directed to enter judgement)
4-21-78	Judgment dtd. 4-20-78 granting judgment to the defts etc., see j filed. fy
4-21-78	By WEINSTEIN, J.—Order extending stay of order dtd. 4-18-78 to 4-21-78 at 5:00 P.M. filed. fy

Relevant Docket Entries

DATE	PROCEEDINGS
4-20-78	Notice of appeal filed by plttfs filed. copies mailed. fy
4-21-78	Sten. transcript dtd. 4-12-78 filed. fy
4-21-78	Letter dtd. 4-17-78 from R. Carroll to J. Weinstein re: defts proposed order filed. fy
4-21-78	Unsigned order filed. fy

Letter to Chancellor Anker Dated 11/9/76

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
Washington, D.C. 20201

November 9, 1976

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

The purpose of this letter is to advise you that the Office for Civil Rights has concluded that portion of its compliance investigation of the Board of Education of the City of New York relating to the employment practices of the school system. On the basis of this investigation, which included an evaluation of specific complaints filed with this Office over a period of years alleging employment discrimination by the school system, I have concluded that the New York City school system is in noncompliance with both Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. This office will advise you of its compliance determinations with respect to the balance of the matters under investigation as part of Equal Educational Services Review by the end of January 1977. These actions are consistent with the recent order of the United States District Court in *Brown v. Mathews,* Civil No. 75-1068 (D. D.C. September 20,

1976), which requires this Department to expeditiously complete certain outstanding investigations.

With respect to employment practices I have concluded that the New York City school system, in violation of section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d), has, on the basis of race and national origin:

(1) denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures and through the use of racially identifiable employment pools in a manner that discriminatorily restricts the placement of minority teachers;

(2) assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools; and

(3) assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students.

I have also concluded that the New York City school system, in violation of section 901 of the Education Amendments of 1972 (20 U.S.C. 1681), has, on the basis of sex:

(1) denied females equal access to positions as principals and assistant principals throughout the system;

(2) provided a lower level of financial support for female athletic coaching programs; and

(3) deprived female teachers of seniority rights and other compensation through failure to eliminate the effects of past discriminatory leave policies.

Discussion of Title VI Violations

(1) *Access to Employment*

The United States Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), held that where the application of an employment test or criterion resulted in an adverse impact on the employment opportunities of minorities, such test or criterion must be considered racially discriminatory unless an employer demonstrates that the test or criterion is "job-related" or "business necessary". Even if a test or criterion is found to be job-related or business necessary, it may not be used if a reasonable alternative system with a lesser differential racial impact exists. (See *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971).) Although the court in *Griggs* specifically addressed Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), the court indicated that its holding was applicable to employment discrimination in general. Accordingly, the Department applies the *Griggs* standard to employment discrimination which arises under Title VI of the Civil Rights Act of 1964.

A. *Hiring Methods*

Since 1968, the District has routinely collected data concerning the racial and ethnic composition of the system's teachers and student body. This information indicates that the percentage of minority teachers employed by the school system during this time period has never exceeded 15 percent of the total teachers in the system. (See Appendix A.) Specifically, data provided to the State of New York as part of the Basic Educational Data System (BEDS) for fall 1975 indicates that across the system 14.3 percent

of the teachers assigned to elementary schools were minority, the minority teacher composition of junior high/intermediate schools was 16.7 percent and the minority teacher composition of high schools was 8.3 percent. (See Appendix B.) More recent data collected by the school system for the Federal government in the spring of 1976 confirms this basic distribution. During the same school year (1975-76), the composition of elementary school students across the system was 69.7 percent minority; junior high/intermediate schools, 70.1 percent minority; and high school, 62.6 percent minority. (See Appendix B.)

This obvious disparity between the percentage of minority teachers and the percentage of minority students in the New York City school system is not consistent with the situation in other large urban school systems throughout the country. Attached at Appendix C is a table showing the racial composition of students and teachers in other such systems. This disparity, coupled with specific allegations of racial discrimination in the hiring practices of the school system, led this Office to investigate the recruitment, testing, selection, licensing and assignment practices of the school system.

As a result of the investigation of these issues, it became apparent that the New York City school system has organized its teacher hiring process into two racially identifiable components. The first component is a series of "rank order" lists promulgated for each subject matter license area by the Board of Examiners, containing the names and scores of those persons who passed a Board of Examiners examination in each license area. These persons are eligible for employment city-wide and are given

employment preference based first on the date the list is promulgated by the Board of Examiners, and second on the numerical test score attained by each applicant.

The second component, referred to as the "alternative method," establishes a hiring pool from which teachers may be selected by some but not all of the system's schools. Under this method, persons may be selected either (1) by being taken out of rank order from the existing rank order lists or (2) by achieving a minimum score (as determined by the Chancellor) on the National Teachers Examination (NTE). This method does not require that preference be given by date of examination or score attained.

In addition, the system divides its schools into two categories for teacher hiring purposes. One group includes (1) all high schools and special schools and (2) certain elementary and junior high/intermediate schools. To determine which elementary and junior high/intermediate schools are included in this group, all elementary and junior high schools in the system are listed in order by the proportion of students in the school who are reading at or above grade level. Those elementary and junior high schools above the 45th percentile on such list ("the non-45th percentile schools") are included in this group. All those elementary and junior high schools at the 45th percentile or below comprise the second group of schools ("the 45th percentile schools"). Schools in the first group may hire teachers in order of rank from the promulgated lists and are precluded from hiring teachers through the "alternative method." Schools in the second group may hire teachers either from the rank order list *or* through the alternative method.

Information provided by the school system shows that the percentage of minority teachers hired on the basis of the National Teachers Examination (one option of the alternative method) is at least four times the percentage of minority teachers on the rank order list. (See Appendix D.) Thus, our investigation reveals that the rank order process dramatically excludes a large number of qualified minority teachers from employment opportunities in a majority of the district's schools, i.e., the high schools, special schools, and the non-45th percentile schools.

The racially identifiable group of teachers who are selected as a result of the alternative method are restricted to 45th percentile schools, which are themselves racially identifiable. The student racial composition of the 45th percentile schools has exceeded 91 percent minority since the alternative hiring method was implemented for the 1971-72 school year. (See Appendix E.) As a result, many minority teachers are not only excluded from full employment opportunity in the non-45th percentile schools but are also channeled to schools in a manner that directly corresponds to the student racial composition of the schools.

The small numbers of minority teachers employed by the system have been reduced by the recent lay-off actions. While these actions have not disproportionately affected minority teachers who did enter the system, the school system's decision to decrease the numbers of minority teachers has only exacerbated the problem created by the exclusionary hiring process.

Therefore, I have concluded that the use of separate hiring pools discriminatorily restricts the access of minority teachers to full employment opportunity in the New York City school system and violates Title VI.

B. *Testing*

In addition to the employment restrictions imposed by the alternative method, the process used by the Board of Examiners to generate the rank order lists and to make other employment eligibility decisions represents a separate discriminatory barrier to minority teacher employment.

There are three distinct but related aspects of the rank order method, each of which has an adverse impact on the hiring of minority applicants:

(1) the date the examination is given;

(2) the pass/fail score achieved on a particular examination; and

(3) the numerical score above passing attained by the applicant on a particular examination.

The use of "date" as a criterion for selection has an exclusionary effect on minority applicants. This is illustrated by the chart attached at Appendix F which shows that for the largest licensing areas, both the number and percentage of minority applicants who took and passed the test have steadily increased year by year. For example, the percentage of blacks among those who passed the Common Branches examination quadrupled between 1968 and 1974 from 2 percent to 8.4 percent as the number of blacks passing the test has increased from 5 to 272. Consequently, the requirement that earlier lists be exhausted before anyone on a later list can be considered creates a constraint on minority employment opportunity. There does not appear to be any business necessity or educational justification for this requirement.

Data supplied by the school system also reveal that the pass/fail criterion established by the Board of Examiners has an adverse impact on minority applicants. The percentage of minority applicants who took and passed the examinations in the largest licensing areas in the years for which data was supplied was significantly lower than the corresponding percentage of non-minority applicants. For example, in the June 1974 Common Branches Examination, 28.5 percent of all blacks who took the test passed, while 65.8 percent of the other applicants taking the test passed. (See Appendix G.)

Similarly, the use of rank order for those passing has an adverse impact on minority employment opportunities. Our review of several different test results, based upon those given in the largest licensing areas, clearly indicates that minority applicants passing the examination consistently were overrepresented in low score categories and underrepresented in high score categories. (See Appendix H.) In the absence of a showing that scores on the Board of Examiners examination are correlated with job performance, this disparity, under the *Griggs* test, violates Title VI.

In addition to the tests used for establishing rank order lists, the pass/fail criterion created by the Board of Examiners for the recertification examinations and the ancillary certificates also poses a barrier to the employment of minorities. In each of the recertification examinations for which the Board of Examiners provided data, the results of the tests demonstrated a disparate impact on blacks. For example, on the January 1976 Math junior high school examination, the pass rate was 47.62 percent for blacks and

76.46 percent for whites. (See Appendix I.) The results of the ancillary certification process show a pattern identical to the recertification examinations. As an example, the results of the June 1975 Early Childhood examination show that the pass rate was 14.29 percent for black and 26.26 percent for whites. (See Appendix J.)

On the basis of the information we have reviewed during our compliance investigation, we have concluded that the test date, the pass/fail score and the rank order list by numerical score each has an adverse impact on minorities. The use of the test date as a measure of the qualifications of minority applicants is neither job related nor business necessary, and the school system has yet to demonstrate the job-relatedness or business necessity, because there are teacher hiring methods readily available to the system which have a less adverse impact on minorities. One of these, the alternative hiring method described above, has been utilized by the system for several years. Another available method is the use of New York State certification as the basic criterion for teacher employment. In order to comply with Title VI, the school system would have to use that hiring method reasonably available to it which has the least adverse racial impact.

(2) *Assignment of Teachers, Principals and Assistant Principals*

This Office has found a significant correlation between the race/ethnicity of professional staff (composed of principals, assistant principals and teachers) and the race/ethnicity of the students in the schools to which the staff are assigned. The statistical strength of the relationship

demonstrates that this assignment pattern is not a random occurrence.

Specifically, minority professional staff are assigned predominantly to minority schools and are rarely assigned to those schools in the system which are predominantly white. For example, 82 percent of all minority teachers are assigned to schools where minority student enrollment exceeds 84 percent, while less than 15 percent of all minority teachers are assigned to those schools where minority student enrollment is below 35 percent. A similar assignment pattern is found for minority assistant principals and principals at the elementary, junior high/intermediate, and high school levels. Spanish-surnamed principals, assistant principals and teachers are concentrated in schools with the highest percentages of Spanish-surnamed students; and black principals, assistant principals and teachers are concentrated in schools with the highest percentages of black students. (See Appendix K.)

In addition to analyzing system-wide assignment patterns, this Office reviewed the assignment of professional staff within each of the thirty-two community school districts. In nearly all community school districts where there are schools with sufficiently varied student racial/ethnic compositions to permit the schools within the district to be characterized as both "minority" and "non-minority," the race/ethnicity of teachers assigned correlates significantly with the student racial/ethnic composition of those schools. Specifically, this pattern was found to exist in Community School Districts 3, 6, 10, 11, 14, 18, 21, 24, 27, 28,* 29, and 31.

* CSD 28 was previously advised of its ineligibility for participation in the ESAA program due to its discriminatory assignment of teachers to schools. This violation is also a violation of Title VI.

In Community School Districts 2, 15, and 30, analysis of the assignment pattern does not produce a statistically significant result. In Community School Districts 1, 4, 5, 7, 8, 9, 12, 13, 16, 17, 19, 20, 22, 23, 25, 26, and 32, because of statistical considerations, a similar assignment analysis could not be conducted. However, each of these community school districts has directly contributed to the city-wide pattern of segregated staff assignment. (See Appendix L.)

The U.S. Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) stated, at page 18, that:

> Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

Based upon the data supplied by the system, I have concluded that, at the elementary, junior high/intermediate and high school levels, teachers, assistant principals and principals have been and continue to be assigned in a manner that creates, confirms and reinforces the racial/ethnic identifiability of the system's schools in violation of the Supreme Court ruling in *Swann v. Charlotte-Mecklenburg* and, thus, Title VI.

(3) *Salary, Experience and Degree Status of Teachers*

Based on information provided by the school system, our investigation revealed that schools with higher percentages of minority students have been assigned teachers with less

experience, lower salaries and fewer advanced degrees than schools with higher percentages of non-minority students. Specifically, an analysis of 1975-76 BEDS data shows at the elementary, junior high/intermediate and high school levels a significant correlation between the percentage of minority students and the average teacher experience in years, the average teacher salary, and the percent of teachers with advanced degrees. For example, the average salary difference between the teachers in schools with the highest percent minority students and teachers in schools with the lowest percent minority students is about $1100 per year for elementary schools, about $1800 for junior high/intermediate schools, and about $1000 for high schools.

On the basis of this information, I have concluded that the New York City school system has violated Title VI and the Departmental regulation, 45 CFR 80.3(b)(ii) by assigning teachers to schools in such a manner that minority children are generally taught by teachers with less experience, lower salary and fewer advanced degrees.

During the course of this investigation, we have received allegations that Community School District #1 has systematically removed minority principals and teachers and replaced them with white principals and teachers. I am advised that internal grievances have been filed and that hearings have been held to examine certain issues relating to the selection of supervisors in Community School District 1. Members of your staff have indicated that the Hearing Officer has made recommendations and that a decision is expected in the near future. Therefore, this Office will await your decision in this matter before it initiates any action.

Discussion of Title IX Violations

(1) *Access to Supervisory Positions*

According to BEDS data for the 1975-76 school year, women comprised 23.3 percent of all school principals in the New York City school system, and 28.2 percent of all assistant principals. In contrast, in 1975-76, women comprised 60.1 percent of the teaching staff and 57.6 percent of other persons in professional staff positions (guidance, library, health care, etc.), and have historically comprised at least that percentage. (See Appendix M.)

Because supervisory positions are normally filled from the ranks of the teaching staff, this disparity, coupled with specific allegations of discriminatory hiring practices, led this Office to investigate the selection practices of the school system with respect to principals and assistant principals.

In the course of this investigation, it became apparent that the New York City school system has consistently utilized vague and subjective employment criteria and procedures as an important part of the selection process.

The New York City school system hires its supervisors pursuant to the procedures and guidelines set forth in Special Circular No. 30. In addition, the community school districts may supplement these guidelines. Special Circular No. 30 prescribes numerous non-objective hiring standards such as "evidence of receptivity to new concepts and ideas," "general philosophy of education," "sense of humor," "personal maturity," and "warmth and understanding." In various community school districts, vague criteria such as "professional integrity and conscientiousness," "ability to

make decisions and evaluations," and "use of English" have been developed and *added* to the process. The use of vague and subjective criteria has facilitated the development of a sex discriminatory hiring pattern for principals and assistant principals.

The Division of Personnel of the Board of Education of the City of New York has recognized this pattern with respect to the hiring of women in supervisory positions. A May 26, 1976 memorandum from the Executive Director of the Division of Personnel indicates that the reason for this failure is that parent committees involved in the selection process feel that only males can be "tough" or "law and order" principals. The existence of vague and subjective employment criteria clearly creates the opportunity for such sex stereotyping.

The prospects for sex discriminatory selection have been further increased by the continuing failure of the school system to establish and enforce selection procedures which contain feasible safeguards which are necessary to preclude considerations of sex from entering the selection process. For example, the responsibility for monitoring the selection processes of the community school districts is not delineated explicitly and varies considerably among districts.

The consequences of these actions are demonstrated by the wide disparity between the percentage of teachers in the New York City school system who possess the specific qualifications required for principal and assistant principal positions and are women and the percentage of principals and assistant principal positions now filled by women. The minimum New York State requirement for supervisory po-

sitions is a Bachelor's Degree plus 30 semester hours of graduate study and three years experience in education. Of teachers employed by the school system during the 1975-76 school year who met this requirement, 59.7 percent are female. New York State requirements for supervisory positions include the provision that 18 of 30 semester hours of graduate study must be in or related to the fields of administration and supervision. Data is not available as to the sex composition of persons meeting this 18 hour requirement, but even significant variations in this category would fail to explain the existing disparity noted above.

We have also taken into consideration the fact that most of the principals and assistant principals in the New York City school system hold a Master's Degree plus 30 hours of college credit. A review of 1975-76 information indicates that this factor is of little value in explaining the substantial disparity. Of those teachers holding a Master's Degree plus 30 hours of college credit, 47.6 percent are female; of such persons in other professional staff positions, 56.6 percent are female. Thus, on the basis of information available about women now employed as teachers who possess the minimum state certification requirements for principal and assistant principal positions, it is clear that women are underrepresented in such positions by a factor of 2 to 1. A virtually identical under representation of women is observed if the actual qualifications possessed by principals and assistant principals in the New York City schools are used as a basis for comparison. (See Appendix N.)

Not only are women substantially underrepresented in these job categories but the proportion of women principals

and assistant principals employed by the system has actually *decreased* since the passage of Title IX. For example, the percentage of female assistant principals has dropped dramatically from 34.2 percent in 1971-72 to 28.2 percent in 1975-76, and their number has been reduced by 57 during a period in which the total number of assistant principals increased by 190.

On the basis of this information, I have concluded that the current process used by the school system to select principals and assistant principals relies on the use of vague and subjective employment criteria which provide an opportunity for discrimination to occur. The application of this process has resulted in the disproportionate exclusion of women from supervisory positions, in violation of the standard set by the United States Court of Appeals in *Rowe v. General Motors,* 457 F.2d 342 (5th Cir. 1972). The *Rowe* decision and its progeny are applicable to sex discrimination as well as race discrimination. Accordingly, the Department applies the *Rowe* standard to employment discrimination which arises under Title IX.

(2) *Allocation of Coaching Services*

An analysis of the data collected during this review reveals a significant disparity between the coaching services for high school athletic programs provided to male and female students. A significant measure of this disparity is the salaries paid to persons coaching male and female athletic activities.

While all coaches are paid equally by the hour, the school system allots certain sports more "sessions" per year than others. For example, boys' basketball has been allo-

cated 80 sessions, while girls' basketball has been allocated only 50 sessions. Baseball, a boys' sport, has been allocated 70 sessions, while softball, a girls' sport, has been allocated only 50 sessions. In sports enrolling a large proportion of female students the coaching salaries are lower than those for sports having a large proportion of male students. (See Appendix O.)

The difference in coaching salaries produces a substantial difference in the salaries paid to male and female coaches. For example, male coaches during the 1975-76 school year earned on the average $1,377 for their services, while female coaches earned $1,155 for theirs. At least part of this substantial difference stems from lower compensation standards based on the sex identifiability of the sports being coached. For example, both men's and women's tennis have been allocated 30 sessions, but male tennis coaches earn an average of approximately $400 per year more than female tennis coaches, a difference which is not explained by Board policy. Whether covered by policy or not, the net result is that men earn an average of $222 per year, or 19 percent more than women, a difference which cannot be attributed to random variation.

On the basis of this information, I have concluded that the New York City school system is allocating a lower level of financial support to athletic coaching instruction being provided to women in violation of Title IX and the Departmental regulation, 45 CFR 86.41.

(3) *Maternity Leave*

In the course of our investigation and because of a complaint filed with this office, information was requested from

the New York City school system concerning the system's past and present maternity leave policies. Our review of this information indicates that the school system's present maternity leave policy (dated September 1, 1973) appears to comply with the requirements of Title IX. On the basis of this review, however, a failure by the school system to overcome the effects of past (pre-September 1973) discriminatory policies has been identified.

Under the pre-September 1973 policies, maternity leave was treated differently from other temporary disabilities and constituted a leave without pay (LWOP). This difference in treatment continues to have an adverse impact on female teachers, with regard to both seniority benefits and reimbursement for sick leave granted other teachers.

Teachers who took maternity leave before September 1973 were not entitled to sick pay for days absent for pre-natal care or maternity-related illness but were required to take LWOP for a specified period. Such teachers, had they been permitted to begin and end maternity leaves at their own discretion and had they not been required to use LWOP for the entire absence, would have accumulated greater seniority. This differential application of leave policies has adversely affected the placement of such teachers on seniority lists used as a basis for layoff decisions in 1975 and 1976 and has continued to disadvantage such teachers in their subsequent placement on preferred eligibility lists for recall.

The adverse impact of this discriminatory treatment was particularly severe for female teachers who served in the school system as regular substitute teachers and took maternity leave before September 1973. At that point in

time, because maternity leave was considered a break in service, all prior service was discounted in thereafter computing seniority, even though other benefits similar to those extended to regular teachers (e.g., salary, pension, accumulation of leave) were similar. While a recent change has occurred in the State Education Law, which allows the counting of all system service in computing seniority, the change is not retroactive to teachers laid off before July 1976.

On the basis of this information, I have concluded that the effects of the system's earlier maternity leave policy have an adverse and continuing impact on women who used maternity leave prior to the 1973-74 school year. This procedure constitutes a neutral employment criterion which continues the effect of previous discrimination in violation of the standard set by numerous court decisions. See, for example, *United States v. Bethlehem Steel Corporation,* 666 F.2d 672 (2d Cir. 1971) and *United States v. N. L. Industries,* 479 F.2d 354 (8th Cir. 1973). Accordingly, this violates Title IX and the Departmental regulation, 45 CFR 86.57(c) and 86.58(b).

In view of the findings set forth above with respect to discriminatory practices in the New York City Public school system, your District must submit a plan to this Office within 90 days of the receipt of this letter setting forth the remedial steps which the District will take in order to comply with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The plan must include provisions for remedying individual instances of past discrimination.

Letter to Chancellor Anker Dated 11/9/76

I am, of course, aware of the complexity of the violations and the difficulty of formulating certain remedies. I am also aware that this investigation came at a time when the school system was experiencing great difficulty due to the City's fiscal problems. Accordingly, Office for Civil Rights and Office of General Counsel staff who have formed the team investigating this matter would be happy to meet with you and members of your staff to explain our findings in greater detail.

The cooperation extended by those members of your staff with whom we have worked is much appreciated. Please be assured that this Office, consistent with its statutory responsibilities, will make every effort to assist the school system in developing a plan to correct the violations which have been identified.

Sincerely,

MARTIN GERRY
Martin H. Gerry
Director
Office for Civil Rights

[Appendix Omitted—See C.A. App. pp. 60-86]

Letter to Irving Anker Dated 7/1/77

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

We have received your school district's application for assistance under the Emergency School Aid Act (ESAA) and have reviewed the district's compliance with the eligibility requirements contained in the statute and the implementing regulations.

I.

On the basis of this review, we have determined that your district does not meet the requirements for eligibility for the reasons described below.

A.

45 CFR 185.43(b)(2) of the ESAA regulations provides:

> No educational agency shall be eligible for assistance under the Act, if after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promoting, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a man-

ner as to identify any of such schools as intended for students of a particular race, color, or national origin.

1. In the New York City Public School system, the hiring of teachers and their assignment to Community School District (CSD's) is accomplished through the procedures discussed in the letter of November 9, 1976, from the Office for Civil Rights to you. As a result of these procedures, in school year 1975-76, the city-wide percentage of minority elementary school teachers for your 32 CSD's was 14.3%. Data indicates that 9 (28%) of your 32 CSD's had minority elementary school student enrollment below 50%. None of those 9 predominantly nonminority CSD's had a percentage of minority teachers above the city-wide percentage. In fact, the highest percentage of minority teachers in any predominantly nonminority CSD was 7.7% in CSD 27. Of the 23 CSD's with predominantly minority student enrollment, 14 (61%) had percentages of minority teachers above the city-wide percentage; and 13 (93%) of those 14 CSD's had minority student enrollment in excess of 75%.

Examples of the discriminatory teacher recruiting, hiring, and assignment patterns which exist in your system follow: CSD 5 had a minority elementary student percentage of 99.1% and a minority elementary teacher percentage of 57.3%; CSD 3, with a minority elementary student percentage of 85.8%, had a minority elementary teacher percentage of 32.2%; CSD 31, on the other hand, had a minority elementary student percentage of 16.8% and a minority elementary teacher percentage of only 2.4%; and CSD 26, with a minority elementary student percentage of 23.7%, had a minority elementary teacher percentage of only 4.6%.

Thus, there is a clear pattern in your school system, wherein minority elementary school teachers are concentrated in CSD's with high percentages of minority elementary school students. Those CSD's with low percentages of minority elementary school students have very low percentages of minority elementary school teachers.

2. The same pattern exists in your junior high schools. The percentage of minority junior high school teachers for all 32 CSD's was 16.7%. Eight (25%) of your 32 CSD's had minority junior high school student enrollments below 50% and none of these 8 CSD's employed more than 10% minority teachers. Of the 24 predominantly minority CSD's, 14 (58%) had percentages of minority junior high school teachers above the citywide percentage; and 13 (93%) of those 14 had minority junior high school student enrollments in excess of 75%.

3. A pattern also exists in the assignment of teachers to high schools in your system. Data indicates that 70% of all minority high school teachers are assigned to high schools in which minority student enrollment exceeds 76%. Conversely, only 30% of all minority high school teachers are assigned to those high schools in which minority student enrollment is below 76%.

Furthermore, it is possible, based on the composition of their teaching staffs, to identify high schools in your system as intended for either minority or nonminority students. A list of the high schools in which this is possible is attached to this letter.

Thus, a pattern exists in your district wherein minority teachers are concentrated in high schools with high per-

centages of minority students. High schools with low percentages of minority students have very low percentages of minority teachers.

4. There also exists within your high schools a clear pattern of assigning minority principals and assistant principals to predominantly minority high schools. Data shows that 70% of the minority assistant principals and 85% of the minority principals are in high schools with minority student enrollment in excess of 76%. Conversely, only 30% of the minority assistant principals and 15% of the minority principals are in high schools with less than 76% minority student enrollment.

In summary, your policies, practices, and procedures, which have been discussed at great length in the aforementioned November letter and have permitted these patterns to develop, have resulted in discrimination on the basis of race, color, or national origin in the recruiting, hiring, and assignment of minority teachers, assistant principals, and principals.

B.

45 CFR 185.43(d)(2) states:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy, or procedure which results in or has resulted in discrimination against children on the basis of race, color, or national origin, including but not limited to:
>
> • • •

> (2) Denying equality of educational opportunity or otherwise discriminating against national origin minority children on the basis of language or cultural background.

1. Information provided in your Title VII (Bilingual Education Programs, Elementary and Secondary Education Act) application for 1975-76 indicated that there were 35,809 students in your system with "limited English language ability." Information provided by you for the Special Compliance Information Report (SCIR) for school year 1975-76 indicated that there were 16,813 students in your system with "moderate and severe" English language difficulty. This represented only students from those schools listed on the Title VII applications. Thus, there was a difference of 18,996 students. Your district apparently failed to ascertain whether or not these 18,996 students were in need of some educational program to remedy their English language difficulty. The large discrepancy between these two reports demonstrated a failure on your part to properly identify and assess the needs of students with limited English language ability, thereby denying equality of educational opportunity to these national origin minority students.

For the 14 Community School Districts not applying individually, a similar discrepancy existed. The Title VII applications for these 14 CSD's showed 15,256 students with limited English language ability. The SCIR's for these same 14 CSD's showed 8,089 students with severe and moderate English language difficulty. Again this number represented only students from those schools listed on the Title VII applications. The difference of 7,167 students

indicated that these 14 CSD's had not properly identified and assessed the needs of students with limited English language ability. Thus, these students have been denied equal educational opportunity on the basis of their language background.

2. Information provided by you in the Special Compliance Information Report (SCID) (1975-76) indicated that there were 63,782 elementary students with severe and moderate English language difficulty in your school system who were classified as requiring some educational program to remedy their English language difficulty. That same report showed that only 43,029 of those students were receiving such educational services. Thus, 20,753 students, identified by you as having severe and moderate English language difficulty, were receiving no such educational services. These 20,753 students, therefore, have been denied equal educational opportunity on the basis of their language background.

An analysis of data in the SCIR's on the 14 CSD's not applying individually, indicated a similar discrepancy between the number of students in these CSD's classified as requiring some educational programs to remedy their English language difficulty and the number of students receiving such services. In these districts 29,833 students were classified as requiring the services. The same reports showed that only 19,141 of those students were receiving such educational services. Thus, 10692 students identified as requiring these educational services were not receiving them.

C.

45 CFR 185.43(d)(6) states:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy, or procedure which results or has resulted in discrimination against children on the basis of race, color, or national origin, including but not limited to:
>
> • • •
>
> (6) Denying comparable facilities or instruction or other services to minority group children enrolled in the schools of such agency on the basis of race, color, or national origin.

1. Analysis of your system indicated that the average experience for elementary schools was approximately 12.2 years in 1975-76. (This average was determined by adding the average teacher experience for each elementary school and dividing that sum by the number of elementary schools in your system.) Twenty-three (72%) of your 32 CSD's had percentages of minority elementary school students above 50%. Of those 23 CSD's, 14 (61%) had an average teacher experience below the city-wide average. Meanwhile, 9 (28%) of your 32 CSD's had percentages of minority elementary school students below 50%, and only 2 (22%) of these 9 CSD's had an average teacher experience below the city-wide mean. Overall, 87.5% of those CSD's with an average teacher experience below the city-wide average were CSD's with high percentages of minority elementary school students enrolled.

A similar pattern existed in your junior high schools. The average teacher experience for junior high schools in your system was approximately 11.0 years. (This average was determined by adding the average teacher experience for each junior high school and dividing that sum by the number of junior high schools in your system.) Of the 24 CSD's with percentages of minority junior high school students above 50%, 17 had an average teacher experience below the city-wide mean. Of the 8 CSD's with percentages of minority junior high school students below 50%, only 1 (12%) had an average teacher experience below the city-wide average. Overall, 94% of those CSD's with an average teacher experience below the city-wide average were CSD's with high percentages of minority students enrolled.

There is a strong relationship between the racial/ethnic composition of the students in CSD's and the experience of the teachers in CSD's. Your policies, practices, and procedures, which have caused or permitted this relationship to exist, have resulted in the denial of comparable instructional services to minority group children. This constitutes discrimination against these minority group children on the basis of race, color, or national origin.

2. Analysis of your school system indicated that, for school year 1975-76, the average teacher salary for all elementary schools in your system was approximately $17,678. (This average was determined by adding the average teacher salaries for each elementary school and dividing that sum by the number of elementary schools in your system.) Twenty-three (72%) of the system's 32 CSD's had percentages of minority elementary school students of over 50%. Of these 23 CSD's, 16 (69%) had average teacher salaries below the citywide average; and 12 (75%) of these

16 employed percentages of minority teachers at or above the city-wide percentage. Meanwhile, of the 9 CSD's with percentages of minority elementary school students below 50%, only 2 (22%) had average teacher salaries below the citywide average. Overall, 88% of the CSD's with average elementary school teacher salaries below the city-wide average were CSD's with high percentages of minority students.

A similar pattern was found in your junior high schools. The average teacher salary for all junior high schools in your system was approximately $17,377. (This average was determined by adding the average teacher salaries for each junior high school and dividing that sum by the number of junior high schools in your system.) Of the 24 CSD's with percentages of minority junior high school students over 50%, 13 (54%) had average teacher salaries below the city-wide average. However, of the 8 CSD's with percentages of minority junior high school students below 50%, only one of the CSD's with average junior high school teacher salaries below the city-wide average enrolled high percentages of minority students.

Your policies, practices, and procedures in the area of teacher salaries have resulted in the denial of comparable instructional services to minority group children on the basis of race, color, or national origin.

D.

45 CFR 185.43(d) states:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy or procedure which results or has resulted in discrimination against children on the basis of race, color, or national origin.

Information from the New York City Board of Education Profiles: Payroll Data (1974-75), showed that academic high schools in your system with low percentages of minority students enrolled received higher per pupil expenditures of tax levy monies for instructional salaries than academic high schools with high percentages of minority students enrolled. Analysis showed that per pupil expenditures of tax levy monies for instructional salaries in high schools with less than 20% minority student enrollment was $844.38, while such expenditures in high schools with more than 80% minority student enrollment was $735.15. Thus, there was a difference of $109.23 per pupil.

Your formula for allocating tax levy monies for instructional salaries discriminated against children in that per pupil expenditures of tax levy monies for students in predominantly minority academic high schools were less than similar expenditures for students in nonminority academic high schools. Thus, your system of allocating tax levy monies for instructional salaries constitutes a violation of 45 CFR 185.43(d).

II.

Your district may request an opportunity to show cause why the determination of ineligibility should be revoked and its application considered for funding. Such a request should be directed to:

Dr. Herman R. Goldberg
Associate Commissioner
Equal Educational Opportunity Programs
Room 2001, Federal Office Building #6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The request must be received (not merely sent) within 14 days of the date of this letter.

If your district requests the opportunity described above, an informal conference with representatives of the district will be held within 7 days of the receipt of the request. Please understand that the purpose of such a conference is to provide your district with an opportunity to demonstrate why it should not have been found ineligible; if your district wishes to take corrective action, see Part III below concerning an application for a waiver of ineligibility.

III.

Your district may establish its eligibility for assistance by applying to the Secretary of Health, Education, and Welfare for a waiver of ineligibility pursuant to section 706(d) of the ESAA (20 U.S.C. 1605(d)) and section 185.44 of the program regulations (45 CFR 185.44). An application for waiver must include information and assurances which show that any activity resulting in ineligibility has ceased to exist and will not reoccur after the submission of the waiver application. (20 U.S.C. 1605(d)(1); 45 CFR 185.44 (b)).

Specifically, an application for a waiver of ineligibility based upon the findings in Section A of Part I above must contain the materials required by 45 CFR 185.44(b), which provides as follows:

> An application for waiver . . . shall contain such information and assurances as will insure that any practice, policy, procedure, or other activity resulting in ineligibility has ceased to exist or occur, and shall include

such provisions as are necessary to insure that such practice, policy, procedure, or activity will not reoccur after the submission of such application.

More specifically, regarding the assignment of high school teachers, an application for a waiver of ineligibility based upon the findings in Section A of Part I above must contain the materials required by 45 CFR 185.44(d)(3), which provides as follows:

> In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by §185.43 (b)(2), such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such nondiscriminatory assignments shall, in the case of a local educational agency implementing a plan described in §185.11(b) conform to the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assignments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole.

Additionally, an application for a waiver of ineligibility based upon the findings in Section B of Part I above, regarding the identification and providing of educational services to students with English language difficulties, must

contain the materials required by 45 CFR 185.44(f)(1), which provides as follows:

> In the case of ineligibility under §185.43(d), an application for waiver shall contain evidence that the practice, policy, or procedure prohibited by §185.43(d) has ceased to exist or occur and that the effects of such practice, policy, or procedure have been remedied or eliminated. In particular:
>
> (1) In the case of a denial of equal educational opportunity to national origin minority children as described in §185.43(d)(2), such agency shall submit an educational plan of sufficient comprehensiveness to remedy or eliminate the effects of such denial and to meet the special educational needs of all national origin minority group children for whose education such agency is responsible. Such a plan, if required and approved under this subparagraph, shall be implemented regardless of whether funds for such purpose are available under the Act.

Finally, an application for a waiver of ineligibility based upon the findings in Sections C and D of Part I, regarding the assignment of experienced teachers and teacher salaries and the per pupil expenditures of tax levy monies, must contain the materials required by 45 CFR 185.44(f), which provides as follows:

> In the case of ineligibility under §185.43(d), an application for waiver shall contain evidence that the practice, policy, or procedure prohibited by §185.43(d) has ceased to exist or occur and that the effects of such practice, policy, or procedure have been remedied or eliminated.

An application for a waiver of ineligibility should be directed to:

David S. Tatel, Director
Office for Civil Rights
Office of the Secretary
Department of Health, Education, and Welfare
300 Independence Avenue, S.W. Room 5514
Washington, D.C. 20201

In order to allow sufficient time for review of applications for waivers prior to the timely commitment of currently available funds, such an application should be submitted as promptly as its full and complete preparation permits. We urge that your district file any application for a waiver, or inform Mr. Tatel of your intention to do so, within 21 days of the date of this letter.

IV.

The issues reviewed in reaching the conclusion that your district is ineligible for assistance under the Emergency School Aid Act (ESAA) do not exhaust your district's civil rights compliance responsibilities. Only the specific eligibility requirements for assistance under ESAA (found at 45 CFR 185.43) were used in making this determination. Accordingly, this letter should be considered separated and apart from the Office for Civil Rights' letters to your district dated November 9, 1976 and January 18, 1977.

This ESAA determination in no way modifies, alters, or otherwise affects the aforementioned letters from the Office for Civil Rights, nor does it preclude additional findings of noncompliance with Federal civil rights laws.

V.

It should be emphasized that this letter relates solely to your district's eligibility for ESAA assistance. The establishment of eligibility does not, by itself, ensure that an application is funded. Funding decisions, of course, are made on the basis of the quality of applications submitted by eligible applicants.

Sincerely,

Herman R. Goldberg
Associate Commissioner
Equal Educational Opportunity Programs

RSimmons/kje/6-16-77

Attachment

High Schools Identifiable as Intended for Minority or Nonminority Students Based on Composition of Teaching Staffs

In the New York City Public School System, 62.6% of the high school students are minority students, and 8.3% of the high school teachers are minority teachers. Thus, it is possible, based on the composition of their teaching staffs, to identify the following high schools as intended for either minority or nonminority students:

School	*% Minority Students*	*% Minority Teachers*
Harlem	100.0	70.0
Ben Franklin	98.3	27.9
Stuyvesant	31.0	2.8
Park East	93.8	40.0
Harlem Prep	98.4	69.2
Murray Bergtraum	86.9	17.9
Lower East Side Prep	100.0	63.2
Martin Luther King, Jr.	96.0	25.0
Satellite Academy	92.9	25.0
Auxiliary Services	85.7	42.0
Bronx HS of Science	31.3	2.8
Jane Addams	98.7	34.3
Lafayette	29.2	0.6
Midwood	32.6	1.7
Abraham Lincoln	37.0	0.7
James Madison	35.6	0.9
New Utrecht	22.5	0.0
Boys and Girls	99.9	20.9
Eastern District	97.0	18.0
Bushwick	94.2	20.4

School	*% Minority Students*	*% Minority Teachers*
Fort Hamilton	30.0	3.7
Sheepshead Bay	32.5	3.7
F.D. Roosevelt	29.4	1.8
South Shore	36.9	2.4
Pacific	99.8	37.5
Redirection	97.7	47.6
William E. Grady	22.2	0.0
August Martin	97.6	16.7
Benjamin Cardozo	38.5	3.2
Francis Lewis	36.9	1.7
Forest Hills	38.8	0.8
Long Island City	30.2	2.8
Richmond Hill	28.5	3.4
Bayside	30.4	1.3
New Dorp	4.3	0.0
Curtis	32.1	3.0
Tottenville	3.7	1.9
Susan E. Wagner	13.0	2.5
Ralph McKee	19.1	3.1

Memorandum of Understanding Between Bd. of Ed. and Office for Civil Rights

MEMORANDUM OF UNDERSTANDING BETWEEN:

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK AND THE OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

The Board of Education agrees to adopt and implement, and the Office for Civil Rights agrees to accept as compliance with the requirements of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, as to the subjects addressed, an affirmative action plan containing, in detailed form, the following commitments and affirmative actions with respect to the employment and assignment of teachers and supervisors in the New York school system:

1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in

paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally-based program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

4. The Board of Education will adopt and implement the following affirmative action procedures, and will sponsor and actively support state legislation at the next session of the Legislature where necessary to accomplish these ends:

   (a) Any test used henceforth to determine whether a person is qualified for a teaching position in the system shall be validated prior to its being administered except that in cases of demonstrable educational necessity, for example, where there are no eligible lists, a test may be used prior to its validation for temporary assignments, provided that validation shall be accomplished as soon as practicable.

   Tests shall be validated pursuant to accepted professional standards as exemplified in the Uniform Guidelines for Employees Selection Procedures (41 Fed. Reg. 51734, Nov. 23, 1976). Prior to the administration of any test, the Office for Civil Rights shall have a reasonable opportunity to review and consult with respect to the design and implementation of the proposed validation.

(b) All existing eligibility lists by license shall be combined, and the names of all persons contained thereon shall be merged with the names of any persons who have passed any new tests, without regard to the dates of examinations.

(c) Rank ordering of persons who have passed examinations for the system shall be abolished.

(d) In employing and assigning teachers pursuant to these modified standards and procedures, the Board of Education will implement affirmative action mechanisms found to be appropriate, such as, for example, giving hiring preference to all eligible persons with prior experience in the system.

(e) In implementing such modified standards and procedures, the Board of Education will take all steps necessary to ensure fulfillment of the foregoing objectives, throughout the system.

5. The Board of Education agrees that, in the event that the above-described legislation is not adopted so as to govern employment decisions for the 1978-79 school year, the Board will seek appropriate litigation in support of the agreed objectives.

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity, and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. Through the adoption and implementation of the affirmative action procedures and legislation provided in paragraph 4 of this Memorandum and other efforts taken or to to be taken by the Board, the Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool.

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.*

The Board had advised the Office for Civil Rights that the Board expects to consult with the United Federation of Teachers and others regarding the selection of the independent expert and the standards and methodology to be used in the above study. Likewise, the Office for Civil Rights has advised the Board that it expects to consult with other government agencies, civil rights organizations, and others regarding the selection of the independent expert and the standards and methodology to be used in the study.

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* The commitment herein is subject to applicable standards of law. (See *Hazelwood School Dist. v. United States*, 97 S. Ct. 2736.)

7. The Board of Education agrees that all employment decisions for teaching personnel, other than those on the Preferred Lists, made between the date of the execution of this Memorandum and the effective date of the above described legislation will be subject to adjustments arising from the new legislation or successful litigation pursuant to Paragraph 5.

8. The Board of Education commits itself to pursue a program of affirmative action to increase the number of women in the supervisory service, including a plan to reach a systemwide level of participation by women within a range representative of the pool of available qualified women by a date to be agreed upon with the Office for Civil Rights. The Board further agrees that it will establish a procedure whereby no person shall be appointed to a supervisory position until an affirmative action officer in the central personnel administration has studied the file of applicants for the particular position and determined that the appointment process demonstrates good faith compliance with the affirmative action plan. The Board agrees to review with the Office for Civil Rights the apropriateness of standards and procedures for selection of supervisory personnel to insure conformity to this paragraph.

9. Not later than one hundred twenty days after the execution of this Memorandum the Board of Education shall submit to the Office for Civil Rights a detailed plan describing the steps and mechanisms to be used in attaining the objectives set forth herein. This plan shall include interim objectives stated by

year, by which the Board will achieve the commitments made herein. During the 120 day period and thereafter during the term of this agreement, the Board of Education will cooperate with the Office for Civil Rights in generating and sharing data and information with respect to compliance with the terms of this Memorandum and the fulfillment of its objectives. The Board shall file with the Office for Civil Rights annual reports at times to be agreed upon by the parties demonstrating the progress toward the interim and final objectives.

The Board of Education of the
City of New York,

by:

IRVING ANKER
Chancellor

The Office for Civil Rights,
United States Department of
Health, Education and Welfare,

by:

DAVID S. TATEL
Director

Date: September 7, 1977

Memorandum of Understanding

The United Federation of Teachers commits itself to support the adoption of legislation, as soon as possible during the 1977-78 term of the New York legislature, with respect to the provisions of paragraph four of the foregoing Memorandum of Understanding between the Board of Education of the City of New York and the Office for Civil Rights of the United States Department of Health, Education, and Welfare, including specifically those provisions relating to abolition of rank ordering of eligibility lists and merging such lists without regard to the dates of examination.

ALBERT SHANKER, President

Affidavit of Herman R. Goldberg Dated 10/18/77

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*

Plaintiffs,

v.

JOSEPH CALIFANO, *et al.*

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

DR. HERMAN R. GOLDBERG, being duly sworn, hereby deposes and says:

1. I am Associate Commissioner for Equal Educational Opportunity Programs, United States Office of Education, Department of Health, Education, and Welfare, and have held this position since July 1, 1971. I submit this affidavit in support of defendants' motion for summary judment in this case.

2. As part of my duties I am responsible for the administration of programs under the Emergency School Aid Act ("ESAA"; 20 U.S.C. 1601 *et seq.*).

3. As provided in section 1601(b) of the Act, the purpose of the ESAA is to provide financial assistance to: (a) meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools; (b) encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and (c) aid school children in overcoming the educational disadvantages of minority group isolation.

4. The ESAA provides for financial assistance to achieve the purposes of the Act to local educational agencies ("LEA"), defined in section 1619(8) of the Act and 45 CFR 185.02(e), and other organizations. The statute was enacted in 1972, and this is the fifth year in which grants under it have been made.

5. ESAA grants relevant to this action are awarded on a competitive basis to applicants which meet the requirements of the statute. They are for one year. Each year there is a new and separate competition for available appropriations.

6. The type of grant which is relevant to this action is a Basic Grant under section 1605(a) of the Act. These are grants to LEA's for specific activities authorized under section 1606 of the Act which support the implementation of a desegregation plan, a plan for the elimination, reduction, or prevention of minority group isolation, an interdistrict transfer plan, or a plan to establish or maintain one or more integrated schools. The types of activities

which may be funded under a Basic Grant are: special remedial services, hiring and training professional staff and teacher aides, inservice teacher training, counseling, new curricula, career education, innovative interracial programs, community activities, administrative services, planning and evaluation, and facility remodeling.

7. Congress originally appropriated $137,600,000 for Basic Grant ESAA assistance for fiscal year 1977 (P.L. 94-439, enacted September 30, 1976). Congress also made a supplemental appropriation of $10,000,000 to provide assistance to school districts for which the original Basic Grant appropriation was insufficient to meet their needs, and which were implementing voluntary plans to eliminate or reduce minority group isolation (P.L. 95-26, enacted May 4, 1977). Under section 406 of P.L. 94-439 and section 301 of P.L. 95-26, the period for obligation of appropriations under those statutes expired on September 30, 1977.

8. This year, LEA's across the country submitted a total of 561 Basic Grant applications requesting assistance totaling $315,496,317. Thus, the aggregate amount of assistance requested by LEA's this year for Basic Grants was more than double the amount appropriated by Congress for such grants. It is my responsibility to ensure that the appropriated funds are made available in the manner prescribed by the Act and its implementing regulations.

9. In order to receive a grant under the Act an LEA must, among other things, meet the requirements of section 1605(d). That section provides that no educational agency shall be eligible for assistance under the Act if it has, since June 23, 1972, engaged in any of several practices set out

in section 1605(d)(1)(A)-(D). Enforcement of the limitations on eligibility in section 1605(d)(1)(A)-(D) is not discretionary. Moreover, section 1605(d)(4) requires that before an application for assistance is approved, the applicant must be determined to be not ineligible by reason of these limitations.

10. If an LEA does not meet the requirements of section 1605(d), it may establish its eligibility for assistance by submitting to the Secretary an application for a waiver of ineligibility. Under section 1605(d)(3) the Secretary may grant an application for a waiver upon determining that the disqualifying practice has ceased to exist and will not reoccur. Regulations implementing section 1605(d) are set out at 45 CFR 185.43 and 185.44.

11. In response to a notice of closing date for receipt of applications published in the Federal Register on November 15, 1976 (41 F.R. 50353), the Board of Education of the City School District of the City of New York (hereinafter "Central Board") and various Community School Districts in the City filed a total of 32 applications for Basic Grants, Pilot Project grants, and Bilingual Project grants under the Act. Of these applications, 23 had sufficient program merit to warrant funding under the minimum standards set out at 45 CFR 185.14 (for Basic Grants), 185.24 (for Pilot Projects), and 185.54 (for Bilingual Projects). See amendments to these regulatory provisions at 42 F.R. 3842, January 21, 1977. Of the 23 applications which exceeded minimum standards, 20 demonstrated sufficient program merit to warrant approval in competition with other applications. However, judgments as to the program merit of applications are separate and apart from determinations as to the

eligibility or ineligibility of applicants under section 1605(d) of the Act.

12. All New York City applicants initially failed to establish eligibility under section 1605(d). However, all such applicants, except the Central Board and Community School Districts #10 and #11 were able to establish their eligibility either by providing additional material at show cause meetings under 45 CFR 185.46 or by taking corrective action and filing successful applications for waivers of ineligibility. Several Community School Districts were initially determined to be ineligible because their faculty assignment practices did not comply with section 1605(d) of the Act and 45 CFR 185.43(b)(2) of the program regulations, but later established their eligibility by taking the necessary corrective action and obtaining waivers of ineligibility.

13. The following New York City Community School Districts received fiscal year 1977 ESAA grants in the amounts indicated:

Basic Grants

C.S.D. #3	$2,700,000
C.S.D. #4	731,612
C.S.D. #6	424,089
C.S.D. #9	485,959
C.S.D. #18	386,753
C.S.D. #19	150,858
C.S.D. #21	1,100,269
C.S.D. #22	407,038
C.S.D. #24	712,853
C.S.D. #25	822,704
C.S.D. #26	410,431
TOTAL	$8,332,566

Pilot Project Grants

C.S.D. #3	$ 982,859
C.S.D. #4	784,831
C.S.D. #13	721,519
C.S.D. #19	777,568
TOTAL	$3,267,777

Bilingual Project Grants

C.S.D. #4	$1,433,227
C.S.D. #19	475,507
TOTAL	$1,908,734

14. The following New York City applicants, referred to in paragraph 12 above, would have received fiscal year 1977 ESAA grants in the amounts indicated but for their failure to meet the requirements of section 1605(d):

Basic Grants

C.S.D. #11	$ 298,891
New York City Central Board	3,559,132
TOTAL	$3,858,023

Pilot Project Grants

C.S.D. #10	$ 124,219

15. The total amount of funds awarded to New York City applicants for Basic Grants, set out in paragraph 13 above ($8,332,566) represents 64.1 percent of the amount awarded for Basic Grants within New York State this year. (The amount awarded does not include the amount set aside for the Central Board and C.S.D. #11 pursuant to this court's order of September 27, 1977.)

16. The Central Board timely filed three applications for fiscal year 1977 assistance under the Act. The Central Board's Pilot Project application failed to meet minimum program standards set out of 45 CFR 185.24 and therefore could not be approved in any event. Its Bilingual Project application met minimum program standards, but funds available to support Bilingual Projects throughout the country were exhausted before the Central Board's application could be reached in rank order; thus, this application could not be funded in any event. See 45 CFR 185.54.

17. The Central Board's initial Basic Grant application contained seven components. It was evaluated under applicable criteria and found not to meet minimum program standards. Pursuant to section 1609(d)(2) of the Act and 45 CFR 185.14, I communicated this finding and the specific reasons for it to the Central Board by a letter to Chancellor Irving Anker dated March 21, 1977 (Exhibit I, attached hereto). The Central Board subsequently resubmitted four revised components of its initial Basic Grant application. (The three omitted components are thus not a part of any pending application.) Each of the four revised components was evaluated separately and the four educational and programmatic quality scores (assigned pursuant to 45 CFR

185.14(b)) were averaged to set the quality score of the application as a whole.

The quality scores of the four components were:

Early Childhood Education	22⅔
Easing Student Adjustment	37⅓
Open Enrollment Centers	34⅔
Reducing Intergroup Tensions	17⅔
Total	112⅓
Average	28.1

Thus, the Central Board's application received a quality score slightly above the minimum of 28 required by 45 CFR 185.14(c)(2). This quality score was then added to the statistical score of 28 (assigned pursuant to 45 CFR 185.14 (a)) to set the total score of 56.1 for the application.

18. In response to the November 15, 1976 notice of closing date referred to in paragraph 11 above, Community School District #11 timely filed applications for a Basic Grant and a Pilot Project grant. Each application was initially found not to meet minimum program standards. I communicated these findings and the specific reasons for them to Community Superintendent Nicholas Cicchetti by letters dated March 21, 1977 (Exhibits 2 and 3 attached hereto). C.S.D. #11 subsequently resubmitted revised applications. The revised Pilot Project application was evaluated and again found not to meet minimum program standards; thus, this application could not be approved in any event. The revised Basic Grant application was evaluated

and assigned an educational and programmatic quality score of 36⅓. This quality score was added to the statistical score of 24 to set the total score of 60⅓ for the application.

19. On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that the Central Board did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Chancellor Anker (Exhibit 4, attached hereto).

20. On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that Community School District #11 did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Community Superintendent Cicchetti (Exhibit 5, attached hereto).

21. In the letter referred to in paragraph 19 above, the Central Board was informed that it could request an opportunity to show cause why the determination of ineligibility should be revoked. The Central Board requested a show cause meeting which was held on July 22, 1977. With respect to faculty assignment, the representatives of the Central Board described, in general terms, the operation of State law concerning teacher assignments and apprised me of union agreements affecting these assignments. In addition, they described steps that the Central Board intended to take in assigning teachers in the future. However, no written material was presented concerning the finding of a failure to meet faculty assignment requirements.

22. I determined that the information presented at the show cause meeting and materials provided by the Central Board under a cover letter to me from Chancellor Anker dated August 10, 1977 (Exhibit 6, attached hereto), did not constitute a sufficient basis to revoke the finding of ineligibility. However, I withdrew that part of the finding related to the issue of comparability of services (teacher experience, salary, and per pupil expenditure). These determinations are set forth in my letter to Chancellor Anker dated September 16, 1977 (Exhibit 7, attached hereto).

23. In the letter referred to in paragraph 20 above, Community School District #11 was informed that it could request an opportunity to show cause why the determination of ineligibility should be revoked. Community Superintendent Cicchetti requested such an opportunity by a letter to me dated July 8, 1977 (Exhibit 8, attached hereto), and on July 20 such a meeting was held by my Assistant, Dr. George R. Rhodes.

24. I determined that the information presented at the show cause meeting and supplementary materials provided by Mr. Cicchetti in a letter to the Director, Office for Civil Rights, dated July 26, 1977 (Exhibit 9, attached hereto) did not constitute a sufficient basis to revoke the finding of ineligibility. However, I withdrew that part of the finding related to the issue of comparability of services (teacher experience). These determinations are set forth in my letter to Mr. Cicchetti dated September 15, 1977 (Exhibit 10, attached hereto).

25. Prior to approval of any ESAA application a determination must be made in accordance with section 1605

(d)(4) that the applicant is not ineligible for assistance by reason of the limitations contained in section 1605(d)(1)(A)-(D) of the Act. For the reasons set out in the letters referred to in paragraphs 19 and 20 above, and taking into account the information presented in connection with the informal meetings referred to in paragraphs 21 and 23 above, I was unable to approve the applications of the Central Board and Community School District #11.

26. On September 27, 1977 this court required defendants in this case to set aside $3,858,023 of fiscal year 1977 appropriations under the Act pending resolution of this matter. Defendants have complied with this requirement. However, in order to do so, it was necessary to deprive other LEA's of funds which would have been made available to them in the absence of the court's order. These LEA's have submitted meritorious applications and, unlike the Central Board and C.S.D. #11, have met the requirements of section 1605(d) of the Act. The LEA's which have thus far been deprived of funds and the amounts of the deprivation to each are as follows:

Charles City County Board of Education, Virginia	$102,689
Berkley County Board of Education, West Virginia	467
Independent School District #625, St. Paul, Minnesota	6,813
Milwaukee Public Schools, Wisconsin	13,861
Ferguson Reorganized School District, Missouri	98,134
Omaha School District, Nebraska	3,971
Pascagoola Municipal Separate School District, Mississippi	198,772

Affidavit of Herman R. Goldberg Dated 10/18/77

27. Inasmuch as the Central Board and Community School District #11 have not established their eligibility for assistance under the ESAA, I urge the court to permit the distribution of the funds now set aside pursuant to the court's order to those eligible applicants identified in paragraph 26 above, and to dissolve the injunction issued in this case.

HERMAN R. GOLDBERG
Herman R. Goldberg

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

Subscribed to and sworn to before me this 18th day of October, 1977.

LORRAINE HALLOWAY
Notary Public

My Commission Expires
Jan. 1, 1978
(Seal)

Affidavit of David S. Tatel Dated 10/26/77

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Plaintiffs,

v.

JOSEPH CALIFANO, *et al.*,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, *ss.*:

DAVID S. TATEL, being duly sworn, hereby deposes and says:

1. I am Director of the Office for Civil Rights (OCR), Department of Health, Education, and Welfare (HEW), and have held this position since May 2, 1977.

2. As part of my duties I am responsible for advising the Associate Commissioner for Equal Educational Opportunity Programs, HEW, on the eligibility of applicants for funds under the Emergency School Aid Act ("ESAA"; 20 U.S.C. 1601 *et seq.*) with particular regard for the treat-

ment of minority groups as required by the Act and the applicable regulations, 45 C.F.R., Part 185.

3. Prior to July 1, 1977 I provided Dr. Herman Goldberg, Associate Commissioner for Equal Educational Opportunity Programs, United States Office of Education, Department of Health, Education, and Welfare with draft letters to Chancellor Irving Anker, and Community School District No. 11 Superintendent Nicholas Cicchetti. The letters recited my determination and recommendation that the Board of Education of the City School District of the City of New York (hereinafter Central Board) and Community School District No. 11 were ineligible for ESAA funds. Among the several reasons of ineligibility cited in these documents was that the Central Board and Community School District No. 11 did not meet the requirements of Section 1605(d)(1)(B) of the Emergency School Aid Act, and its implementing regulation, 45 C.F.R. Section 185.43(b)(2). These letters contained the factual information set forth in the July 1, 1977 letters from Dr. Goldberg to Chancellor Anker and Superintendent Cicchetti. (See exhibits 4 and 5, Goldberg, Affidavit). I also provided Dr. Goldberg with a copy of a November 9, 1976 letter from Martin Gerry to Chancellor Anker (Exhibit 11 attached hereto).

My recommendation was based on information contained in the following letters and documents:

A. Letter from Martin Gerry, Director, Office for Civil Rights to Chancellor Irving Anker, Board of Education of the City of New York, dated November 9, 1976. (Exhibit 11).

B. Letter and attachment from Robert J. Christen, School Board President and Chancellor Irving Anker to Mr. Albert Hamlin, Acting Director, Office of Civil Rights, dated April 22, 1977. (Exhibit 12)

C. Document Board of Education of the City of New York Division of Personnel—Bureau of Professional Liason and Staffing: *Schools Eligible for Alternative Selection Methods.* (Exhibit 13)

D. Document, Board of Education of the City of New York, dated November, 1975. *Seniority and Layoffs. A Review of Recent Court Decisions and Their Possible Impact on the New York City Public School System, Working Note No. 1 in a Series Assuring Equal Employment Opportunities in the City School District of New York.* (Exhibit 14) (On March 31, 1976 Dr. Bernard Esrig, Special Assistant to Dr. Gifford, informed the Office for Civil Rights, that the race/ethnicity of persons appointed under the NTE option was determined by a telephone survey.)

E. Document, Board of Education of the City of New York, Division of Personnel, dated March 26, 1974: *Persons Appointed Under the NTE Process.* (Exhibit 15)

F. New York City School System, Breakdown by Race, School Years 1971/2-1975/6, Students, dated 30 September 1975. (Exhibit 16)

G. New York City School System, Breakdown by Race, School Years 1971/2-1975/6, Full-Time Teachers, dated 30 September 1976. (Exhibit 17)

H. New York City School System, Totals 1971/1972 thru 1975-1976, dated 26 October 1976. (Exhibit 18)

I. New York City School System, Professional Staff and Student Ethnicity Illustrated by District, 1975-1976, dated 30 September 1976. (Exhibit 19)

J. New York City School System, Professional Staff Assignment by Ethnicity Illustrated by Schools in Quartiles of Student Ethnicity, 1975-76, dated 30 September 1976. (Exhibit 20)

4. Prior to September 15, 1977 I received the following documents:

A. *Race, Ethnicity, and Equal Employment Opportunity: An Investigation of Access to Employment and Assignment of Professional Personnel in New York City's Public Schools. Working Note No. 2 in a Series. Assuring Equal Employment Opportunities in the City School District of New York, June 1977, Board of Education of the City of New York.* (Exhibit 21).

B. *Board of Education of the City of New York Office of the Chancellor, Revised Copy August 9, 1977, Supporting Data Requested by Dr. Herman Goldberg at Meeting of July 22, 1977 to Show Cause for Revocation of Ineligibility for 1977-1978 ESAA Funds to the Central Board of Education of the City of New York.* (Same as Exhibit 6, Affidavit of Herman Goldberg.)

5. By letter dated July 6, 1977 to Chancellor Irving Anker (Exhibit 22) this office extended its efforts to provide assistance to the Central Board and all Community School Districts to develop acceptable plans to come into compliance with the waiver requirements of the Act.

6. My office has consistently apprised the Central Board and Community School Boards that voluntary compliance with provisions of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendment of 1972 would not in themselves insure compliance with specific requirements of the Emergency School Aid Act. (See Exhibit 23)

DAVID S. TATEL

District of Columbia)
City of Washington)

Subscribed to and sworn to before me this 26th day of October, 1977.

LORRAINE HALLOWAY
Notary Public
My Commission Expires Jan. 1, 1978

Transcript of Proceedings Before Weinstein, J.
Dated 10/31/77

[Pages 10-13]

I must say that I am reluctant but I am going to have to grant the Government's motion for summary judgment.

I find that the Government's position here is difficult for me to understand, but I don't believe I have any alternative.

This constitutes my findings.

Based on the facts before me, Plaintiffs allege that the denial by the United States Department of Health, Education and Welfare of their applications for funds under the Emergency School Aid Act (ESAA), 20 United States Code, Section 1601, etc., violates that Act and is arbitrary, capricious and illegal in violation of The Administrative Procedure Act, 5 U.S.C., Section 702, etc. They seek injunctive relief.

The imagination and tenacity with which HEW is enforcing its legal obligation to insure that Federal funds are not used to foster racial discrimination in education is admirable. Nevertheless, the enormous power that control of the purse gives the Washington bureaucracy must be exercised with meticulous regard for local rights lest it be used abusively to punish local school boards (and the children they educate) for racial situations the localities do not condone and are seeking to eliminate.

Denial of the funds involved in this litigation are based on findings by HEW that teachers in New York City are assigned by the Board of Education in a racially discriminatory manner.

In support of this finding, the defendants argued in this Court that the City's agreement of September 9, 1977, with HEW, designed to reduce racial disparities in teacher

school assignments, is a concession that teacher allocations have been made illegally in the past. But this agreement was in the nature of a consent judgment without any concession by the City of illegality. Apparently, it was entered into under the threat of massive withholding of Federal funds. To use this agreement as the evidentiary basis for withholding separate educational funds is quite unfair. This purported justification for finding Plaintiffs guilty of racial discrimination in teacher assignment is without merit. Similarly without merit the City's contention that because HEW allowed funds under ESAA to individual school boards that it was required to allow funds to the Central School Board. The allowance may be due to certain compromises or it may have been due to a decision by the same Administrator which was inconsistent with the decision here. Nevertheless, consistency is not required as long as there is a reasonable basis for decision.

Based on the record, a decision by the Administrator to allow ESAA funds to the City, would certainly have been upheld, since the City made a very good case to show that it had not engaged in a pattern or practice or policy or procedure after 1972, that is June 23, 1972, designed for segregation purposes.

But on the other hand, there was a reasonable basis for a decision that it had so discriminated. This Court's powers are extremely limited. In this respect, considering the high school statistics, the State statutes, the United Federation of Teachers agreements, the wishes of individual Black principals, the desires of the individual Parent-Teachers Associations, community school board and Black and White communities, the Administrator could find a

practice, policy or procedure after June 23, 1972, resulting in the identification of schools as intended for students of a particular race, color or national origin through the assignment of teachers to those schools.

Accordingly, with the greatest reluctance because it is the children of the schools who will suffer from this decision of the Administrator, the Court grants the Government's motion for summary judgment.

Ms. Carroll: Your Honor, will there be a specific ruling on the District 11 application since the facts that affect the Government's denial of that application are different from those with respect to the Board of Education?

The Court: Why did you deny District 11? What is there about District 11? What is there different about District 11 as against other districts?

Mr. Glassman: The other individual districts came into compliance by reassigning their teachers within their own school district and there was a specific waiver of regulations and we were able to fund them. But District 11 chose not to do so.

The Court: Teachers were not reassigned within the district?

Mr. Glassman: No, they have not been, your Honor.

The Court: Is that so?

Order of Weinstein, J. Dated 11/1/77

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 77 C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Plaintiffs,

—against—

JOSEPH CALIFANO, SECRETARY, United States Department of Health, Education and Welfare, *et al.*,

Defendants.

ORDER

This cause having come on to be heard before the undersigned United States District Judge on the 31st day of October, 1977, upon cross-motions for summary judgment by plaintiffs and defendants, and David G. Trager, United States Attorney for the Eastern District of New York by Richard P. Caro and Rodger C. Field, Assistant United States Attorneys, Jeremiah Glassman, Department of Justice, of counsel, having appeared on behalf of defendants, and Hon. W. Bernard Richland, Corporation Counsel, City of New York, by Rosemary Caroll, Assistant Corporation Counsel, having appeared for plaintiffs, and the court having heard and considered arguments of counsel, and upon the findings of fact and conclusions of law set forth in the record, and upon all of the pleadings and papers herein, it is hereby:

Order of Weinstein, J. Dated 11/1/77

ORDERED, ADJUDGED AND DECREED, that the motion for summary judgment of plaintiff, Community School Board of Community School District #11, is in all respects granted, and it is further

ORDERED, that the motion for summary judgment of defendants is in all respects granted with respect to all other plaintiffs herein, and it is further

ORDERED, that the temporary restraining order previously entered in this action on September 29, 1977 and subsequently extended by an order dated October 6, 1977 is hereby extended until ten days from the date of this order, pending further order of this Court, and it is further

ORDERED, that a motion for reconsideration by any party may be made within ten days of the date of this order.

Dated: Brooklyn, New York
October 31, 1977

JACK B. WEINSTEIN
U.S.D.J.

Letter to Irving Anker Dated 12/9/77

(Seal)

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D.C. 20202

DEC 9 1977

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

As you are aware, the matter of your district's ineligibility for Emergency School Aid Act (ESAA) funding for school year 1977-78 has been remanded to the Department of Health, Education, and Welfare by the United States District Court for the Eastern District of New York. In his opinion, dated November 18, 1977, Judge Weinstein designated the issue on remand to be whether your district is ineligible on the ground of discrimination in the assignment of teachers on the basis of race, color, or national origin. The evidentiary basis for the determination of ineligibility on that ground was described in our letter to you of July 1, 1977.

Pursuant to Judge Weinstein's opinion and order, this notice is to give your district a new opportunity to show cause why the determination of ineligibility pursuant to

Letter to Irving Anker Dated 12/9/77

20 U.S.C. §1605(d)(1)(B) and the HEW regulation 45 C.F.R. 185.43(b)(2) should be revoked.

If you notify us that it is your desire to take advantage of this opportunity an informal meeting for that purpose will be convened at 10:30 a.m. on Friday December 16, 1977, in Room 2001, Federal Office Building #6, 400 Maryland Avenue, S.W., Washington, D.C. No reporter or transcript will be provided.

Pursuant to Judge Weinstein's order, the standard which will be used to determine whether your district has discriminated in violation of ESAA is whether: (1) the school board was maintaining an illegally segregated school system on June 23, 1972 and it took no effective steps to desegregate after that date, or (2) it had a practice after June 23, 1972, that was segregative in intent, design or foreseeable effect. At the informal meeting you may submit all evidence which is relevant to these standards and we will consider it.

Since we are informed by the Office for Civil Rights that it is now engaged in a review of your district's response to its letter of October 4, 1977, we do not construe that letter as containing the basis for a final finding of racial discrimination which you should address at the informal meeting.

Sincerely,

HERMAN R. GOLDBERG
Herman R. Goldberg
Associate Commissioner
Equal Education Opportunity
Programs

Affidavit of Irving Anker Dated 1/4/78

UNITED STATES DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

In the Matter of the Application of the City School District of the City of New York for 1977-78 Funding under the Emergency School Aid Act

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

IRVING ANKER, being duly sworn, deposes and says:

1. I am the Chancellor of the City School District of the City of New York and having knowledge of the facts as set forth hereafter submit this affidavit in support of its 1977-78 application for funds under the Emergency School Aid Act (ESAA).

2. By letter dated July 1, 1977, I was notified that the Board's 1977-78 ESAA application was denied on several grounds (Exhibit "1").

3. In the interim, HEW has either settled, revoked or decided not to advance all other grounds for ESAA ineligibility alleged in that letter and now solely asserts violation of 45 C.F.R. 185.43(b)(2) in teacher assignment as the basis for ineligibility, that is, that ethnic teacher staff statistics evidence a pattern of assignment from which

it is "possible: to identify schools as intended for students of a particular race, color or national origin."

4. The number of minority teachers and their distribution primarily resulted from and were affected by nondiscriminatory factors such as demographic changes in the student population of the City schools; state law; collective-bargaining agreements' neutral date of hire seniority practices; minority incidence in the relevant available work force; and incidence and distribution of vacancies in specific teacher license areas.

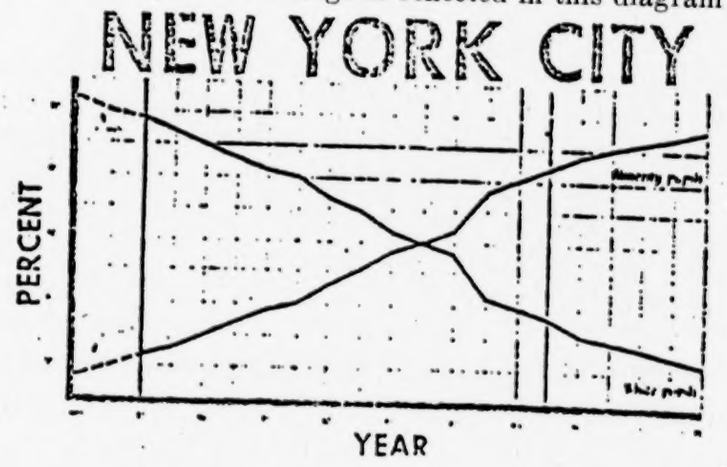
4. *Student Population.* Over the last 20 years a constant and irreversible trend has emerged in New York City comparable to that experienced in many major urban school systems: the City School district formerly integrated and with a high incidence of non-minority students has become increasingly minority. (See Board ESAA Plan, 1977-78.)

Factors beyond the control of the school system affected the ethnic student balance of New York City Schools: employment rate, especially among unskilled workers, increased incidence and cost of welfare, significant migration of minorities to New York City, increased enrollment of non-minority students in non-public schools and the exodus of whites from the City. For example, the net migration of non-whites to New York City for 1960-70 was 915,566, while the net emigration of whites was 702,699. (Ibid., III, p. 8).

The difficulty of effecting ethnic student balance within schools, already magnified by this demographic trend, is further heightened by housing patterns reflecting broad geographic concentrations of minority groups in the Bronx, Manhattan and most recently in Brooklyn.

The housing pattern in Brooklyn is characteristic of the situation city-wide. Formerly, areas of Black and Puerto Rican concentrations were separated from each other by areas of white population. Over the last 10 years the areas of minority group concentration have tended to merge so that fringe areas low in non-minority populations now separate minority concentrations. The net result is few concentrations of contiguous minority and non-minority concentrations available for racial balance in the local schools.

Perhaps the most dramatic evidence of the population change is reflected in the school attendance figures for the last 20 years. In 1957, the New York City student population was 68.3% non-minority; in 1975, 32.1% non-minority. In the elementary schools, student population was 64.4% non-minority; in 1975, 30.2% non-minority. In the Junior High Schools the student population decreased from 65.0% non-minority in 1957 to 30.1% non-minority in 1975. The rapidity of the transformation is evidenced by population statistics for the high schools where a 79% non-minority student population in 1960 has been drastically reduced in 1975 to 37.4%. The change is reflected in this diagram:



5. *Zoning for Racial Balance.* Recognizing this emerging trend in student population, as early as 1954, the Board adopted a Plan for Integration in New York City Schools which has embraced various innovative strategies to improve quality integrated education and reduce minority student isolation. A Division of Zoning and Integration was established to implement and watch-dog school site selection, open enrollment, pairing of ethnically disparate schools, and school feeder patterns and rezonings for racial balance. Heterogeneous student group practices and staff and student training in inter-group relations were adopted to diminish minority student isolation and racial strife. (See ESAA Plan, pp. 16-100).

In the high schools, which offer the greatest potential for integrated education, the Board has adopted policies which encourage minority students to attend non-minority dominant high schools, but which preclude such transfers by non-minority students. Thus under an Open Admissions Plan schools at least 65% minority are "sending" schools while schools which are integrated or predominantly non-minority are "receiving" schools. (Ibid., pp. 66-68).

Recognizing that the system as a whole has become so overwhelmingly minority in student population as to preclude integration in all schools by any program of student population shifting, the Board has recently concentrated its efforts on stabilizing and maintaining those schools which are approaching the 50% minority student level. These schools offer the best chance for quality integrated education. (Ibid., pp. 73-83).

6. Staff of the Department of Education and the ESAA plan itself at no time required statistics on either the

ethnic incidence or distribution of staff to the public schools and it is for this reason that the Board's ESAA plan contains no staffing statistics.

7. In fact, HEW has employed a shifting and inconsistent standard in reviewing the Board's ESAA application as regards statutory requirements for ethnic staffing. For example, the OCR report referred to in the July 1, 1977 letter of ineligibility, found objectionable the disparity between the percentage of minority students and the percentage of minority teachers in the New York City Public Schools. In rebuttal, we pointed out that since teacher candidates are derived from the available work force and not the student population, the objection was obviously groundless. Moreover, an *exact* matching of student and teacher ethnicity is inconsistent with the ESAA requirement of non-segregated educational systems. Additionally, even in 1970, the minority teacher hire rate approximated the percentage of minority individuals in the relevant labor pool of college graduates, as per available population statistics.

8. Apparently abandoning this comparison of teacher-student ethnicity as the basis for determining whether the assignment of teachers violated ESAA, HEW then examined statistical data on the system-wide distribution of teachers and concluded that the assignment of teachers was discriminatory not because the percentage of minority students differed significantly from the percentage of minority teachers as previously urged but rather, because some schools appeared to be more ethnically homogeneous than others in their student and staffing populations. From

these statistics alone it was concluded that some schools were identified as intended for students of a particular race, color or national origin in violation of ESAA. That conclusion is unwarranted. Teacher appointments and assignments result from policy factors, including state law procedures which do not discriminate on the basis of race, color or national origin.

9. *State Law.* All teacher assignments in New York City Public Schools until 1970 were made pursuant to the provisions of Education Law §2569, and §2573(10). Under that statutory scheme, the Chancellor requested (Educ. L. §2573(2) the Board of Examiners to conduct competitive examinations for pedagogical licenses and promulgate lists of candidates ranked in order of performance on the examinations (Educ. L. §2569) which are then certified to the Board for permanent appointment and assignment of teachers in rank order. (Educ. L. §2573(10a)). Additionally, substitute licenses were issued pursuant to State Law for temporary staffing of schools. Eligible lists do not describe nor identify the race, color or national origin of candidates for pedagogical assignments.

This statutory scheme (Educ. L. §§2569, 2573) was the sole method of teacher appointment and assignment until the legislative revisions of the Education Law in 1969.

10. *State Law Amendments.* In 1969, the percentage of minority teachers in the school system was approximately 7%, the percentage of minority students almost 60%. Thus, a dynamically increasing minority student population was met with a relatively static minority teacher hire rate.

Effective September 1969, the New York City School System was restructured into 32 decentralized Community School Districts which, subject to the powers retained by the Central Board and the Chancellor, were authorized to appoint and assign teachers. (Article 52-A, Educ. L., §2590-e(2)).

In the same year Education Law §2590-j was amended to permit the appointment and assignment of teachers regardless of candidate ranking on eligible lists to schools where the reading level is below the 45 percentile of reading scores for the City School District. (Educ. L. §2590-j 5(b)). Additionally, the Education Law was amended to permit the appointment of persons who passed the National Teachers Examination (NTE) to teaching positions in 45 percentile schools. (Educ. L. §2590-j 5(C) and (C)(1)).

These amendments established a qualifying examination rather than a ranked competitive examination as an alternative method of teacher assignment to elementary and junior high schools in community school districts where reading scores were below the 45% of City-wide reading tests.

11. *Purposes sought to be achieved by amendments.* These amendments, so fundamentally transforming the appointment and assignment process in the New York City School District, of necessity required the cooperation and served the needs of diverse elements in the educational community.

The enactment of decentralization and alternative methods for teacher appointment primarily addressed these concerns: (1) improvement of pupil reading achievement levels, hence the inclusion of 45 percentile schools, (2) maximization of opportunity for community control-based solutions to problems of disparate student educational

achievement, (3) elimination of a developing over-dependence on substitute assignments for minority dominant school staffing, and (4) expansion of the number of minority teachers in the New York City School System.

It is clear that the legislators intended to improve minority teacher representation in the school system. Among the statements illustrative of this point was the following made by Senator Zaretski: "We retain the Board of Examiners, but when we come to the lower 45% as measured by the reading ability of the schools of the City of New York—the lower 45 percent, it is almost a half; you either take the central board list or you have a special qualifying list which is much easier to get, and so it will be much easier to fill by the local school boards. For those who want teachers from the minority groups, they will be able to get them from this qualifying list. And then you have the National Teachers' exam plus state certification—all in this bill."

Use of the NTE and a qualifying rather than competitive candidate pool for teacher assignments was adopted upon analysis of evidence developed by the Board that where these alternative selection procedures were used in various other school districts in the United States, minority teacher hire rates increased.

A more purely educational consideration also affected the Board's support of these amendments to the Education Law. In the mid-sixties there evolved an educational consensus, most strongly embraced by minority educators, that the problem of low minority student achievement should be addressed at least experimentally, by exploring the impact of minority teacher role model on minority educational achievement.

12. *Impact of state law amendments on minority hire rate.* Utilization of these alternative procedures resulted in a dramatic percentage change in the number of minority teachers:

Ethnic Census of Teacher Staff
Total—New York City
Increase/Decrease from 1970-1971 to 1974-1975

Ethnic Group	*1970-1971*	*1974-1975*	*No. Change*	*% Change*
Black	4,601	5,229	+698	+15.2%
Oriental	211	299	+88	+41.7%
Hispanic	803	1,707	+904	+112.6%
(Sub-Total Minority)	(5,625)	(7,316)	(+1,691)	(+30.1%)
Other	54,060	49,110	—5,950	—11.0%
Total	59,675	55,415	—4,250	—7.1%

The full time minority professional staff, including principals, assistant principals, reading and other instructional staff, has similarly increased from 1970-1975 by +26.6%. (See Exhibit VI—Ethnic Composition of Professional Staff 1970-1975).

13. *Court order and collective bargaining agreements.* Regarding the apparent concentration of Hispanic teachers in schools with high concentrations of Hispanic students, implementation of the consent decree in *Aspira of New York v. Board of Education, et al.*, 72 Civ. 4002, requiring the provision of bilingual instruction to Spanish-language dominant children has resulted in the challenged concen-

tration and not discriminatory purposes or practices. And, for the period 1970-1975, the percent increase of Hispanic teachers is 112.6%.

Additionally, provisions of applicable collective bargaining agreements entitle teachers to assignments within the school system based upon neutral date-of-hire seniority as vacancies accrue. As part of our continuing effort to achieve quality integrated education, the Board has adopted a teacher assignment plan for the 1977 school year by which non-minority teachers now on lay-off will be assigned to districts with high concentration of minority teachers, and, conversely, school districts with high concentrations of minority teachers will be assigned to non-minority teachers. Because these teachers are on lay-off there is neither contractual nor statutory bar to this assignment plan.

14. It has been the consistent policy of the New York City Board of Education to afford quality integrated education in the City School District, now a minority student dominant District. Factors basically neutral but resulting in distribution and incidence disparities have curtailed the Board's ability to effect innovative integration strategies. But, there has been no policy practice or procedure designated to identify schools within the 32 Community School Districts as intended for students of a particular race, color or national origin.

15. The July 1, 1977 letter suggests that there is a pattern of assignments in the community school districts, illustrated by the ethnic staffing statistics for community school districts 5, 3, 31 and 26, which violates ESAA and the applicable regulations.

16. As stated above, staffing decisions for schools within these community school districts, and all other districts, is vested in the community school boards and not in the Board.

17. HEW has not found the community districts to be ineligible for funding: Districts 3 and 26 were approved for funding, District 5 was a quality reject, and District 31 did not apply.

18. In fact, HEW has found every community school board applicant eligible for ESAA funding other than District 11.

19. The Board has supported the goal of increasing opportunities for minority employment in the school system through minority recruitment, development of a career plan for para-professionals and broadening of teacher selection criteria. It has at the same time implemented standardized selection procedures to actualize the commitment to equal employment opportunity for all applicants for employment.

20. There is no basis in logic or reason for holding the Board ineligible for ESAA funding based upon alleged discrimination in teacher assignments in community school districts since such assignments are not made by the Board and since defendants have found all community school boards applicants eligible for 1977-78 ESAA funding.

21. Defendant Goldberg's July 1, 1977 letter similarly charges that a pattern exists in the assignment of teachers to high schools which violates 45 C.F.R. §185.43(b)(2) in

that it is "possible" based upon composition of their teaching staff to identify high schools as intended for either minority or non-minority students.

22. An analysis of the staffing of New York City high schools must begin with the observation that following World War II and continuing through the 1970's, New York City and virtually every other major city in the United States, experienced a mass exodus of middle class whites to the surrounding suburbs. The ethnicity of the student population of the New York City high schools reflects the trend from a system whose student population was overwhelmingly non-minority (69.7% in 1959) to a predominantly minority student population, 62% projected for 1977-78. (See Board's ESAA Plan extract contrasting base year 1959-60 to project year 1977-78.)

23. Each borough of the City has experienced this demographic phenomena and differs only in the percentage of completion of the process. Thus, Manhattan by 1976, had virtually exhausted the process with a resulting white student population of 5%.* Bronx is well along the way with 18%, Brooklyn is at 37% and Queens is at 52%. Projections for the 1980-81 school year for the high schools in Queens, which has the greatest non-minority student population, is 35% non-minority. Thus, the charge that certain high schools are intended for children of a particular race, color or national origin, must be examined in the context of the demographic changes which have transformed the student population of the high schools.

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* Figures are for academic high schools.

24. The Board's ESAA plan outlines the various strategies developed by the Office of Zoning and Integration to foster racial balance and eliminate or prevent minority student isolation. These zoning efforts document the Board's continuous commitment to integration in the high schools.

25. Attached to defendant Goldberg's letter of July 1, 1977, is a list of 39 high schools cited as having student and teacher ethnicity levels which "possibly" indicate that these high schools are intended for students of a particular race, color or national origin. A school by school analysis of this list proves that such inference was entirely unfounded.

26. Turning to that list Harlem, Park East, Harlem Prep, Lower East Side Prep, Satelite Academy, Pacific, Redirection and Auxiliary Services are all independent alternative high schools. They should not properly be part of an analysis of staffing pattern in New York City high schools because the unique historical development of these schools, the exceptional methods of teacher selection, their special educational programs and curriculum all preclude comparison with other high schools.

27. The students in these schools have all dropped out of other schools. Because of various impediments to learning such as drug addiction, pregnancy, criminal records, or more generalized social maladjustment these students require curriculum programs and counselling different in focus and concentration from that offered in other high schools. The schools themselves were originally private community schools. They have traditionally offered personalized guidance services, flexible curriculum and stag-

gered teacher hours geared to the special needs of their students. For example, many of these schools operate into the evening hours. Teachers, thus, must be willing to work long and inconvenient hours. They must be motivated to develop contacts in the community, participate in family counselling and in general perform a myriad of duties which reflect a pervasive commitment to teaching children with special problems that affect their ability to learn. Recognizing the degree of teacher commitment necessary to meet the challenge at these special schools, the Board relies solely upon voluntary applications for staffing these alternative schools. There is, thus, no comparability between these schools or their teaching staffs and other high schools.

28. Returning to the HEW list of high schools. Bushwick and Eastern District High Schools both have high concentrations of Hispanic children who are non-English dominant. These schools provide the *Aspira* consent decree program, Title VII Bilingual Programs and English as a Second Language Programs (E.S.L.). Of the 130 teachers at Eastern District, 16 are Hispanic. Even using HEW's mathematical method of determining discrimination, subtractig these 16 teachers from the 13.0% minority teachers at that school puts its staffing level to the 8.3% high school-wide minority teacher population. Similarly, of Bushwick High School's 146 teachers, 6 are Hispanic. Subtracting these teachers from the minority teacher percentage puts that school's minority teacher percentage within 5% of the 8.3% figure.

29. The Board is required to provide the *Aspira* program to all eligible children and has consequently had to hire bilingual staff on an expedited basis. The educational justification for a resulting concentration of Hispanic teachers in schools with high percentages of Hispanic children requires no further elaboration.

30. August Martin High School, succeeded Woodrow Wilson High School in Southeastern Queens and was, when opened in 1971, the only magnet thematic school in the City. The theory of a magnet school is that by developing a curriculum around an innovative educational theme students of all backgrounds will be attracted to attend the school. August Martin's location near John F. Kennedy International Airport, made it an ideal site for a magnet school emphasizing aerospace studies.

31. Teachers generally were selected from eligible lists to fill staff positions at August Martin but in instances where there were no licenses for specific aerospace subjects recruitment of persons with the most related backgrounds was undertaken. For example, there is no license in flying instructions—but, a common branches teacher with a flight instruction service was hired and 150 students, in fact, fly planes as part of the program. Similar selections were made for avionics, radio communication and other courses for which there are no specific licenses.

32. The school is located in a largely black middle class area has a high attendance rate of 91% and 90% of its students go on to college. It has a work-study cycle at Kennedy airport providing jobs in airplane maintenance, repair and airline clerical and reception work. It has 6 Title I teachers, all of whom are monitored by Title I com-

pliance teams. Many of the minority teachers have been part of the school staff since the time it was Wilson High School, that is, for over six-eight years.

33. In assigning teachers to the innovative programs at this school, the Board has not assigned teachers on the basis of race, but, rather, on the basis of possession of specific licenses in subject areas to be taught or by assignment of persons with relevant experience and most comparable licenses.

Subtracting the number of minority teachers in these high schools from the minority teacher total system-wide there are only 7.3% of all teachers who are minority group individuals to be distributed throughout the system, or conversely, a system that is 92.7% non-minority. Even with this small percentage available for distribution, there are virtually no high schools which do not fall within an acceptable range of deviation.

34. Returning to the list of high schools again, 23 of the 39 schools are integrated schools, that is, the percentage of non-minority students there is at least 50%. As such, they cannot be identified as intended for children of a particular race, color or national origin. See 45 C.F.R. §185.01(g). Moreover, a careful analysis of these integrated high schools reveals that those schools with the lowest percent of minority children, New Dorp 4.3%, Tottenville 13.0%, Ralph McKee 19.1%, are all geographically isolated, located in Staten Island, where the percentage of minority students is approximately 14.5%.

35. The Board operates 110 secondary schools in the five boroughs of the City with a student population of 315,000. During the 1975-76 school year, 8.3% of the teachers in the high schools were minority group members.

36. The high school staffing pattern reflects the academic subject matter or vocational courses offered at the specific high school. Generally, the license areas with the fewest number of qualified and licensed teachers are mathematics, chemistry, physics, English and most recently, Spanish and Hebrew. Eligible lists for these areas are completely exhausted and recertifications and even substitute licensed staff are recruited to fill such vacancies. For the bilingual areas, license examinations were developed only recently. On the other hand, some license areas traditionally have had greater numbers of licensed minority teachers than other. For example, the minority passing rate for English H.S. license was relatively high, 43% (1968) and 49.23% (1974) and for Social Studies H.S. license, low 00.00% (1968) and 7.69% (1974). Also, there is a greater incidence of minority group members possessing pedagogical licenses in home economics, cosmetology, and nursing, than for example in math, physics or chemistry.

37. The high school staffing pattern also reflects the yearly teacher attrition rate, and teacher transfers. Schools with average teacher longevity of 10-15 years will more often be predominantly white than minority in teaching staff since the percentage of minority teachers with college degrees at that earlier period was even lower than the current 6% of all college graduates who are minority group members.

38. The existence of these factors affecting distribution precludes a random distribution of the 7.3% of minority teachers in every high school. Moreover, I can not agree with HEW's notion that achievement of such percentage distribution means that there is no discrimination. Tokenistic percentages may well mask blatant discrimination.

39. For example, many neutral factors affect the percentage of minority teachers at Jane Addams Vocational High School in the Bronx. The school is located in one of the most blighted areas of the South Bronx. While it is an open enrollment school, the number of white student transferees into it are negligible. The school has 80 teachers, for a student enrollment of 1,500. It has a Title I program, with 2 minority teachers. The major concentration of minority teachers in this school are in the Nursing Department with average teacher seniority of ten (10) years for 14 of the 18 black teachers. (In fact, the most recently excessed* teachers were non-minority.) The attrition rate is low, less than 3 teachers a year. The concentration of minority teachers at this vocational school does not result from discriminatory assignment; it results primarily from the fact that many local minority students enroll in the nursing program and that there is a concentration of minority group women in the nursing profession who have received licenses to teach nursing.

40. The three remaining high schools in Manhattan, Benjamin Franklin, Murry Bergtraum and Martin Luther King, Jr. are all located in the Borough of Manhattan where the percentage of non-minority children is 5%. While children zoned to those schools may attend non-minority dominant high schools under choice of admission programs, the percentage of students exercising that option has not significantly lessened minority student concentrations there.

41. Murry Bergtraum High School for Business Careers and Martin Luther King, Jr. High School are both new

* Least senior teachers are transferred when reductions in student enrollment require reduction in number of teachers on staff.

schools opened in September, 1975. As new schools they are entitled to recruit 35% of staff by voluntary transfer of teachers from other schools and by new hires.

42. Many of the voluntary teacher transfers to these schools were minority professionals who were eager to have the opportunity of working with minority children. Both schools have *Aspira,* Title VII and English as a Second Language programs. The need for such programs is especially obvious at Bergtraum, located in the lower east side of Manhattan just north of the Brooklyn Bridge in an area populated by Spanish, Chinese, Japanese, French, Portuguese and Italian children.

43. Moreover, contrary to HEW's contention, King has 11% minority teachers and Bergtraum 13% minority teachers. This percentage of the teaching staff is clearly within HEW's 8.3% quota.

44. Benjamin Franklin High School is located on the FDR Drive in East Harlem. The teacher staffing pattern is affected by its geographic isolation, the high degree of crime in the area and the long walk from the nearest subway to the school. These factors contribute to a rather high teacher turnover and absentee rate. On the other hand, because of the high concentration of Spanish language dominant youngsters and the existence of the *Aspira* program there has been a significant increase in the number of Hispanic teachers at the school.

45. In staffing these schools, however, the Board of Education has not earmarked them as schools intended for children of a particular race, color or national origin. Moreover, given the overwhelming minority student con-

centration in Manhattan (95%) an imposed ethnic quota in these schools of 8.3% as sought by HEW is educationally pointless.

46. As the affidavit of Rufus Thomas, which is submitted herewith, demonstrates the matter of staffing each High School involves, *inter alia,* factors of availability, geography, license, prime, vacancies and seniority.

47. The actual individual facts for each high show that there has not been purposive discrimination and that uniformed reliance on statistics alone is entirely inappropriate to the resolution of so complicated a matter.

48. The high school system in New York is large, complex and diverse. It addresses the various educational and social needs of a population that ranges from poverty level to middle class. A myriad of variables affect teacher assignment and preclude mathematic exactness in distribution of minority teachers. I urge HEW to examine the facts for each school. Then it must conclude that computer printout alone can not be relied upon and that the City School District is entitled to funds to supplement its continuing efforts to achieve quality integrated education.

/s/ Irving Anker
Irving Anker

Sworn to before me this
4 day of January, 1978.

Joel W. Gellar
Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Commission Expires March 30, 1978

Affidavit of Rufus Thomas Dated 1/4/78

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

In the Matter of the Application of the City School District of The City of New York for 1977-78 ESAA Funding.

Affidavit

State of New York
County of ss.:

Rufus Thomas, being duly sworn, deposes and says:

1. I am the Unit Head of the Centralized License Unit of the Office of Pedagogical Personnel, and having knowledge of the facts as stated hereafter, submit this affidavit in support of the City School District of the City of New York's 1977-78 application for ESAA funding.

2. The Office of Pedagogical Personnel has sole responsibility for pedagogical appointments to the high schools in the City School District. As Unit Head, I am responsible, *inter alia,* for the supervision and co-ordination of these appointments.

3. From my experience in this division, I can assure HEW that statistics of ethnic distribution of high school teachers merely describe the status quo. They do not, in any manner begin to elucidate the reasons for the staffing patterns that have developed in the New York City High

Schools. In such a complex urban school district consideration of those factors and their impact on hiring is essential to a valid evaluation of the inference to be drawn from statistics.

4. I will exclude from my comments the factor of demographic changes in the student population of the high schools explored in the Anker affidavit. Instead I will focus closely on the appointment process and its operation in the context of the on-going operation of particular high schools to elucidate the myriad factors which affect the staffing patterns in the New York City High Schools.

5. Preliminarily, the Office of Pedagogical Personnel receives status reports from high school principals usually semi-annually at the commencement of each new school term, listing the number of vacancies and/or excessed positions in each high school for that term. After review by my staff, wherever possible, teachers scheduled to be excessed will fill vacancies in the same high school where sufficient similarity of license permits.

6. Upon receipt of this information, and after the number and nature of vacancies and/or excessed* positions is verified, and intraschool adjustments made, the Office of Pedagogical Personnel draws from lists of licensed areas in rank order, and assigns such persons to the high schools based upon verified vacancies. The 45% out of rank

* Excessing denotes the number of teachers in excess of prescribed teacher quotas based on student enrollment. Where enrollment declines schools are required to transfer or excess the least senior employees to receiving schools, that is, schools which have vacancies to be filled.

order and NTE exceptions do not apply to the centralized high schools.

7. In addition to the assignment procedures described above, assignments are affected by teachers who, having served for five years may request transfers once yearly, at May 15th. Further, teacher assignments result from requests for hardship transfers, that is a request for assignment to a high school for which the commuting time does not exceed one and one-half hours from their residence to high school of employment.

8. Thus, each semester, there is a reorganization of the high school teacher staff based upon accrued vacancies, excess positions, voluntary transfers, and hardship transfers.

9. The teacher staffing situation in the high schools is also affected by the incidence of other factors largely beyond the control of the Office of Personnel, and which affect the appointment process. For example, Boys and Girls High Schools in the Bedford Stuyvesant area of Brooklyn, has had a chronic teacher turnover rate. The number of vacancies for these schools has consistently exceeded the norm for vacancies system-wide, and, as in all difficult to staff schools, the vacancy problem is not static, that is, it continues throughout the school year so that 60% of its vacancies are filled during the term. Thus, Boys and Girls High Schools have experienced teacher vacancies as indicated below:

Total	*Year*
34 vacancies in	September 1972
31	February 1973
20	September 1973
N. R.*	February 1974
21	July 1974
38	February 1975
40	September 1975
N. R.*	February 1976
50	September 1976
20	February 1977
39	September 1977

* No records submitted

10. Another factor affecting teacher assignment at Boys and Girls High Schools is teacher security. Presently, 18 school guards and two police officers are assigned to the school to maintain security. Nevertheless, the number of assaults on staff in that school for the 1975-76 school year totalled 78. Records of vandalism to teacher property, including automobiles, are not maintained by the Board of Education, but my conversations with both the school principal, and staff members, indicates a high incidence of vandalism and theft. The school itself is located a long walk away from public transportation, in one of the highest crime precincts in the Borough of Brooklyn. Thus, for every vacancy at Boys High School this office must, on an average, notify between 7 and 15 potential applicants. For the vacancy in an English teacher position, 30 applicants had to be notified before the position could be filled. Even with this extensive recruitment effort, there has continuously been a problem in effecting permanent teacher ap-

pointments there, and the school has been staffed largely with substitute teachers.

11. The procedure for appointment of teachers is (1) notification of appointment to the school, and (2) certification of appointment, that is, that the appointee actually took the position offered. Where an individual indicates that he (she) cannot take the appointment at any school, he (she) must furnish my office with proof that such declination does not result from personal choice but rather emanates from a legitimate disability, such as an actual contract of other employment, medical proof of physical disability, pregnancy, or actual matriculation in a college or university that is verified by an official school transcript, or letter of certification of matriculation. Annexed hereto as Exhibit "A" are the forms utilized by the Centralized License Unit in certifying the bona fides of appointee declinations.

12. It should be observed, for example, that the declination of an assignment to Boys and Girls High School on the ground of other employment must be verified by a contract to be submitted by the appointee. (See Exhibit "A", p. 2).

13. Where an individual submits an explanation for declination which does not meet the standards described above, that individual's name is permanently removed from the list of persons to be appointed. No further appointments and offers will be made to him or her.

14. New Utrecht High School, which has had virtually no teacher turnover during the period 1972 to the present, and no staff assaults whatsoever for the 1971-76 and 1976-

77 school years, presents the staffing situation virtually opposite to that experienced at Boys and Girls High School. For example, for the period February 1973 to date, there have been requests for only one regular appointment to that school. Thus, statistics on the staffing pattern in those schools alone cannot provide any indication of the different circumstances surrounding the actual implementation of appointments.

14. (sic) It is, of course, evident that given the small number of minority individuals with high school license available for appointment, it is virtually impossible to assure the exact percentage homogeneity throughout the entire system, given, among other things, variety of vacancies that occur. Prior to 1977, this Unit did not maintain statistics on ethnicity of teacher appointments.

15. In the predominantly non-minority high schools, other than those in Staten Island, which are geographically isolated, and present transportation-related problems, the statistics indicate that for the period 1972-76 there has been no pattern, practice or procedure identifying these schools by relation to ethnic staff statistics as intended for students of a particular race, color or national origin. The numbers of minority teachers there have not fluctuated despite the fact that each has become increasingly minority in student population. For example, Benjamin Cardozo High School had 4 minority teachers in 1972 and has 4 today. Francis Lewis High School had 3 minority teachers in 1972 and 3 today. Forest Hills High School had one (1) minority teacher in 1972 and one (1) today. Long Island City High School had 2 minority teachers in 1972 and 2 today.

16. In each of these schools the percentage of non-minority children has declined during the period 1972-76, e.g., Cardoza 75% to 54.6%, Francis Lewis H.S. 69% to 60.2%, Forest Hills H.S. 79.5% to 57.5%, Long Island City H.S. 71.4% to 70.4%, Bayside H.S. 76.7% to 64.9%, Abraham Lincoln H.S. 73% to 66.6%, James Madison H.S. 69.8% to 66.6%, Midwood H.S. 69.1% to 64.4%, Lafayette H.S. 76.1% to 68.2% and William Grady H.S. 88.4% to 76.6%. The minority student population increased in these schools while the student population for most of these schools experienced significant reduction, occasioning excessing and other dislocations. Thus, the teacher ethnicity pattern is primarily random resulting from many variables that are involved in school staffing. It cannot be maintained that in the face of this complexity that distribution in the high schools is the product of a policy or practice of discrimination. This office has monitored appointments carefully and attempted in every instance to employ an educationally oriented and non-discriminatory policy in making assignments to the high schools.

/s/ RUFUS THOMAS
RUFUS THOMAS

Sworn to before me this
4th day of January, 1978.

FELIX V. BAXTER
Felix V. Baxter
Notary Public
Qualified in the County of Kings
Commission Expires June, 1979
24-4646864

Letter to Irving Anker Dated 3/22/78

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
Washington, D.C. 20202

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

We have reconsidered the matter of your district's eligibility for Emergency School Aid Act (ESAA) funding for school year 1977-78, as required by the United States District Court for the Eastern District of New York. *Board of Education of the City School District of the City of New York, et al.* v. *Califano, et al.*, No. 77-C-1928 (November 18, 1977).

In our letter of December 9, 1977, we told you that an informal meeting would be arranged to give your district a new opportunity to show cause why our determination that your district is ineligible on the ground of discrimination in the assignment of teachers on the basis of race, color, or national origin pursuant to 20 U.S.C. §1605(d)(1)(B) and the HEW regulation 45 C.F.R. 185.43(b)(2) should be revoked. The informal meeting was held on January 5, 1978. Affidavits and other documents were submitted to us, and school district officials discussed your eligibility with us. Additional materials were received from your district by mail. After carefully considering each

point made by your representatives, we regrettably conclude that the City School District of the City of New York remains ineligible for assistance under the Emergency School Aid Act for school year 1977-1978.

The Emergency School Aid Act authorizes Federal financial assistance to meet special needs incident to the elimination of minority group segregation and to encourage the voluntary elimination, reduction or prevention of minority group isolation in elementary and secondary schools. To be eligible for ESAA assistance, an applicant must be implementing (or prepared to implement) a qualifying plan for desegregation or the reduction, prevention or elimination of racial isolation, or a plan to establish or maintain one or more integrated schools. Each application is reviewed for plan eligibility and a determination is made as to whether the applicant meets the civil rights related limitations on eligibility as contained in 45 C.F.R. section 185.43 of the ESAA regulations. These limitations, among other things, preclude school districts from having in effect any practice, policy, or procedure which results in discrimination in the recruiting, hiring, promotion, payment, demotion, dismissal or assignment of personnel, including the assignment of full-time classroom teachers in such a manner as to identify any school as intended for students of a particular race, color, or national origin (section 185.43(b)(2)).

As you know, by letter dated November 9, 1976, the Office for Civil Rights advised the New York City Board of Education (Board) of its violation of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, on the basis of race and national origin. The letter of findings was issued after

the completion of an investigation relating to the employment practices of the school system. Specifically, it was found that the system denied minority teachers full access to employment opportunity through the use of selection and testing procedures that have not been validated in accordance with legal requirements and that resulted in the disproportionately low hiring of minority candidates. It also found that teachers, assistant principals, and principals were assigned in a manner that had created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools.

With regard to the assignment of teachers, principals and assistant principals, the OCR letter of November 9, 1976, therefore, specifically found the Board in noncompliance with Title VI. I made an identical finding in my letter of ineligibility for ESAA dated July 1, 1977. The assignment data in these letters were not refuted by the district either in our first show cause meeting of July 22, 1977, or our second such meeting of January 5, 1978. Rather, school district representatives said that the teacher assignment and distribution in the New York City public schools is basically due to:

1. State education law
2. Collective bargaining agreements
3. Demographic changes in student assignment
4. Incidence and distribution of vacancies in specific teacher license areas
5. Teacher turnover (attrition) rate of schools in favorable neighborhoods vis-a-vis schools in undesirable areas

Representatives of your school district argued that these five conditions precluded a less segregated teacher distribution prior to our letter of September 1977 in which we previously determined that you are ineligible to participate in the ESAA program. However those arguments are addressed in part by section 703(a), 42 U.S.C. 1602, of the Emergency School Aid Act (P.L. 92-318 enacted June 23, 1972) which states that:

> It is the policy of the United States that Guidelines and criteria established pursuant to this title shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Eighteen of the 32 Community School Districts in New York City independently applied for ESAA funding. All districts were granted waivers to participate in the ESAA program with the exception of CSDs 10, 11, and 15. Each of these three districts was in violation of 45 CFR 185.43 (b)(2) by reason of their teacher assignment to schools. Of the re[illegible]ing 15 districts, seven (7) were notified of their ineligibility for funding due to teacher assignments. These districts were CSDs 3, 6, 13, 18, 19, 24, and 32. Waivers were subsequently granted these districts after voluntary teacher reassignments were made and each CSD advised H.E.W. of the reassignment.

However, your district filed suit in the Eastern District of New York on September 27, 1977, and obtained the order of November 18, 1977, which we have followed in giving

a new consideration to each of the factors which you allege show that you have not discriminated. In doing so, we have addressed the following concern of the Court:

> This court's power of review is limited. 5 U.S.C. §706. Had H.E.W. adhered to constitutionally mandated procedure and to statutory standards its decision, whether favorable or unfavorable to the City, would have had to be affirmed. The record before this court suggests that the agency failed to consider the evidence offered by plaintiffs because it mistakenly believed it to be irrelevant. The matter must, therefore, be remanded for further consideration by H.E.W.

Board of Education v. Califano, slip op., p. 2.

We have considered all of the evidence your district has presented with the court's statement in mind. In particular, as we advised you in our letter of December 9, 1977, we have focused on the following standard established by Judge Weinstein:

> Before declaring a school board ineligible for ESAA funds, H.E.W. must find either that (1) the school board was maintaining an illegally segregated school system on June 23, 1972 and it took no effective steps to desegregate after that date or (2) it had a practice after June 23, 1972 that was segregative in intent, design or foreseeable effect. It may rely on statistics alone to make this finding, but it may not ignore evidence tending to rebut the inferences drawn from the statistics.
>
> "A school board is entitled to an informal hearing to challenge a finding of ineligibility under ESAA. At a minimum an informal hearing requires the parties to be made aware (1) of the substantive standards that will apply, (2) that evidence submitted relevant to these standards will be considered, and (3) the reason for an adverse decision. *Board of Education v. Califano,* slip op. pp. 51-52.

We hereby determine, as required by the court, that on and before June 23, 1972, the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the requirements of the ESAA. We also determine that after June 23, 1972, the district took no effective steps to desegregate the system, which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments which were segregative in intent, design, or foreseeable effect. The district has been given an opportunity to rebut the statistical *prima facie* case of discrimination, but its explanations are not persuasive. See *ibid,* slip op. pp. 52-53.

We have also kept before us the following principle from Judge Weinstein's opinion:

> Nothing in the Constitution or ESAA's statute, legislative history, or administrative regulation justifies granting funds on the ground that a discriminatory practice has been beyond the local school authority's ability to control. This purported defense of the Central Board, though poignant in its demonstration of

> lack of personal blameworthiness, may be unconvincing to H.E.W. The fact that the discriminatory patterns which resulted in correlation of teacher and student assignment by race may have been exacerbated by state statutes and policies is only relevant if those factors can be shown to be racially neutral. The Central Board is chargeable with discrimination caused by state statutes. H.E.W. could find that the statistical disparities are so grossly disproportionate to what would be expected in a racially neutral system that they represented a practice of discrimination based upon color or national origin in the assignment of teachers. *Ibid,* slip op., pp. 54-55.

It is our finding that the assignments of minority, particularly black and Hispanic teachers, as well as other teachers in your school district are such that they could have come about only through foreseeable acts of discrimination. The data demonstrating that minority teachers were concentrated in schools at all levels with a predominance of minority students was extensively set out in the November 9, 1976, letter from OCR, in our ESAA denial letter of July 1, 1977, and in the evidence presented to Judge Weinstein in *Board of Education v. Califano.* Equally important is the fact that schools which at all levels were predominantly non-minority in student population, often are staffed by few and sometimes no minority teachers.

In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), the Supreme Court stated that:

> Independent of student assignment, where it is possible to identify a "White school" or a "Negro school"

> simply by reference to the racial composition of teachers and staff. . . . A *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

Judge Weinstein summarized the data as follows:

> The statistical data does lend support to H.E.W.'s finding that subsequent to 1972 there was a pattern of assigning teachers by the Central Board in a way that would tend to correlate the race of the teacher with the predominant race of the students in the school. There is a direct correlation between the numbers of minority teachers and the percentage of minority students in the City's schools when the schools are broken down into groups of low, medium and high minority school population.
>
> Information on the high schools is particularly damaging to the Central Board's case since it, and not the Local Boards, controls high schools. *Ibid,* slip op. p. 16.

The racial assignment of faculty in your district is strikingly illustrated by the absence of minority teachers at certain high schools serving predominantly non-minority student bodies. The placement of teachers at the high schools is strictly under the control of the Central Board. Even if we were to concede that racial concentrations may sometimes be acceptable in small, special purpose schools, the following were not adequately explained at the January meeting or otherwise.

School	*% Minority Students*	*% Minority Teachers*
New Utrecht	22.5	0.0
Lafayette	29.2	0.6
James Madison	35.6	0.9
Abraham Lincoln	37.0	0.7
Forest Hills	38.8	0.8
William E. Grady	22.2	0.0
Franklin D. Roosevelt	29.4	1.8
Bayside	30.4	1.3
Francis Lewis	36.9	1.7
Southshore	36.9	2.4

To date, despite our requests we have not been given an adequate explanation of the absence of minority teachers at these schools.

Neither was a response provided giving the effective steps the district has taken to desegregate the faculties of its schools. No evidence has been submitted to show the patterns of racial assignment of teachers have changed in the current year substantially from that in 1975-76 or previously. A request by the HEW counsel present at the January 5, 1978, meeting for data showing the racial patterns of teacher assignment in 1969 and earlier for comparison was not met by the district. Nor was current data provided to demonstrate whether these patterns have been corrected.

We have not been provided with legally sufficient explanations to rebut our finding that teacher assignment has been discriminatory in violation of ESAA. We have noted previously that the alternative hiring methods under the State decentralization law have tended to concentrate minority

teachers in schools with predominantly minority student populations. The Anker affidavit submitted at the January 1978 meeting indicates that this result was specifically intended, at least in the so-called "lower 45%" schools as measured by the reading ability of their students. Other evidence indicates the 45% schools were known at the time of the decentralization legislation to be predominantly minority schools. (See Anker affidavit of January 4, 1978, p. 8.)

Your affidavit, in citing the legislative history of the decentralization law, identifies and supports the increase in *representation* of minority teachers in your district. In fact, we believe while this may be the posture of the district, the statistical evidence conclusively demonstrates that the statements made by your representatives fully support the conclusions of the OCR letter of findings concerning the discriminatory assignment patterns which result from the dual hiring methods in your district. The OCR letter of November 9, 1976, said:

> Information provided by the school system shows that the percentage of minority teachers hired on the basis of the National Teachers Examination (one option of the alternative method) is at least four times the percentage of minority teachers on the rank order list. . . . *Thus, our investigation reveals that the rank order process dramatically excludes a large number of qualified minority teachers from employment opportunities in a majority of the district's schools, i.e., the high schools, special schools, and the non-45th percentile schools.*
>
> The racially identifiable group of teachers who are selected as a result of the alternative method are

> restricted to 45th percentile schools, which are themselves racially identifiable. The student racial composition of the 45th percentile schools has exceeded 91 percent minority since the alternative hiring method was implemented for the 1971-72 school year. . . . *As a result, many minority teachers are not only excluded from full employment opportunity in the non-45th percentile schools but are also channeled to schools in a manner that directly corresponds to the student racial composition of the schools.* (Emphasis added.)

The fact that the assignments that foreseeably concentrated minority teachers at minority schools arose from state law does not excuse those practices. That is the basic meaning of *Brown v. Board of Education,* 347 U.S. 483 (1954). Accord, *United States v. Indianola Municipal Separate School District,* 410 F.2d 626, 632 (5th Cir. 1969), *cert. denied,* 396 U.S. 1011 (1969); *United States v. Board of Education of Bessemer,* 396 F.2d 44 (5th Cir. 1968). Whether a result of State law, ordinance, or simple custom, a finding of intentional, constitutionally proscribed, student or faculty segregation may be grounded upon a finding of:

> . . . actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. *Hart v. Community School Board of Education, N. Y. School District #21,* 512 F 2d 37, 50 (2nd Cir. 1975).

In this instance, both Board policy and State law had the natural and foreseeable consequence of producing faculty segregation.

District representatives have also argued that teacher transfers, such as would be necessary to correct the present racial concentrations are restricted by union contract. However, collective bargaining agreements or other volitional arrangements entered into by the school authorities may not excuse constitutionally forbidden segregation. *Hobson v. Hanson,* 269 F. Supp. 401, 502 (D.D.C. 1967), aff'd *sub nom Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969). Nor may teachers as agents of school authorities, legally choose to segregate themselves. *Kelly v. Guinn,* 456 F.2d 99, 197 fn. 8 (9th Cir. 1972); *Reed v. Rhodes,* 422 F. Supp. 708, 787 (N.D. Ohio 1976). For the same reason, the related argument that teacher vacancies in the so-called "desirable" high schools (almost entirely non-minority) must await "attrition" is legally inadequate. Further, while we have considered your argument concerning vacancies in teacher license areas, that consideration cannot explain the degree of racial segregation present here.

It is well established that benevolence of motive does not excuse segregative acts. *United States v. School District of Omaha,* 521 F.2d 530, 535 (8th Cir. 1975); *Hart v. Community School Board of Education, supra,* 512 F.2d at 50. This principle alone rebuts the school district's reference to "role models" as an excuse for concentrating minority teachers with minority students. See Anker affidavit, p. 9. This argument was specifically rejected as a defense to segregation in *Omaha, supra,* 521 F. 2d at 538, fn. 14. Accord, *Arthur v. Nyquist,* 415 F. Supp. 904 (W.D.N.Y. 1976).

Finally, we have concluded that two additional arguments offered by your district are refutable. We understand that the presence of some Hispanic teachers at schools with

large numbers of Hispanic students may be related to the bilingual program. However, no evidence was provided to show that all or most of the Hispanic teachers assigned in the district have been placed in accordance with the so-called ASPIRA decree or any other recognized program, and such an explanation cannot account for the degree of racial, as well as ethnic, separation present here. (In fact, a majority of the qualified bilingual teachers are *not* Hispanic.) Nor has evidence demonstrated that student demographic changes have had any substantial effect on the character of faculties at schools in the district.

In conclusion, I regret that I must inform you that, upon reconsideration, I find that your district remains ineligible for ESAA for the school year 1977-78, even under the standards enunciated by Judge Weinstein's opinion of November 18, 1977.

Sincerely yours,

HERMAN R. GOLDBERG
Herman R. Goldberg
Associate Commissioner
Equal Education Opportunity
Program

Affidavit of Charles Schonhaut Dated 4/78

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 C 1928

(JBW)

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICTS OF THE CITY OF NEW YORK, *et al.*,

Plaintiffs,

—against—

JOSEPH CALIFANO, *et al.*,

Defendants.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF KINGS, *ss.:*

CHARLES SCHONHAUT, being duly sworn, deposes and says:

1. I am the Senior Assistant to the Chancellor of the City School District of the City of New York and having knowledge of the facts as stated hereafter submit this affidavit in support of plaintiff Board of Education's (hereafter "Board") application for a preliminary injunction and judgment.

2. As the Senior Assistant to the Chancellor, I have, for three years, been responsible for implementing accountability designs in the various departments of the

Board, monitoring program effectiveness in the Office of Educational Evaluation, assisting the Chancellor in establishing minimum educational standards, and system-wide, promotion, grade organization and evaluation policies and in general assisting the Chancellor in the various *ad hoc* assignments which arise in the day to day operation of the school system. Most recently, I have been designated principal negotiator of matters raised in the November 9, 1976 and January 18, 1977 (revised on October 4, 1977) findings of the Office for Civil Rights, H.E.W., which charged the City School District with various violations of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of Rehabilitation Act of 1973. Prior to becoming the Senior Assistant to the Chancellor, I was Community Superintendent of Community School District #17 in Brooklyn for four years, Principal of P.S. 120-K for three years and Assistant Principal of J.H.S. 263-K for ten years.

3. By letter dated July 1, 1977, the Chancellor was notified that the Board's 1977-78 application for funds under the Emergency School Aid Act (ESAA) was denied on several grounds.

4. In the interim, through negotiation and further data collection, HEW has either settled, revoked or decided not to advance all other grounds for ESAA ineligibility alleged in that letter and solely asserted violation of 45 C.F.R. 185.43(b)(2) in teacher assignment as the basis for ineligibility, that is, that ethnic teacher staff statistics evidence a pattern of assignment from which it is "possible to identify schools as intended for students of a particular race, color or national origin."

5. On or about September 27, 1977 the Board commenced this action seeking an injunction against implementation of the Goldberg decision of July 1, 1977.

6. By a memorandum and order dated November 18, 1977, this Court granted a preliminary injunction and ordered H.E.W. to conduct a proceeding to determine *de novo* the Board of Education's eligibility for ESAA funding.

7. By letter dated December 9, 1977 the Chancellor was informed by HEW that an "informal meeting" would be held to provide the City School District with an opportunity to explain why HEW's determination of the New York City School District's ineligibility on the ground of discrimination in the assignment of teachers on the basis of race, color or national origin is erroneous and should be revoked.

8. The Show Cause Hearing, which I personally attended and testified at, was held on January 5, 1978 in the offices of Herman R. Goldberg, Associate Commissioner, Equal Educational Opportunity Programs, Department of Health, Education and Welfare. A transcription of the proceeding was made (Exhibit "1").* Additionally, Marie DeCanio, Deputy Executive Director, Division of Personnel testified to procedures and practices of the Division of Personnel, Office of Pedagogical Appointments in the assignment of teachers, the nature and incidence of teacher vacancies throughout the City School District, the relevant collective bargaining procedures and state law and contractual agreements affecting the distribution of teachers in the City

* Transcript references shall be noted by "T" and page(s).

School District. The record was also supplemented by the Thomas and Anker affidavits (Exhibits "2" and "3") and the post-hearing submissions requested by H.E.W. (Exhibits "4" and "5").

9. At the hearing, I explained how the operation and interaction of a multiplicity of complex factors beyond the control of New York City School District accounted for the racial/ethnic distribution of teachers throughout the school system. Among the numerous racially neutral factors affecting the racial/ethnic distribution of teaching staff in the New York City School District which I orally explained to Dr. Goldberg or directed his attention to in written submissions were the following: demographic changes in the student population of the City schools, state law, collective bargaining agreements' neutral date of hire, seniority practices, special programs for non-English speaking students, minority evidence in the relevant available work force, and incidence and distribution of vacancies in specific teacher license areas.

10. *Demographic Changes in Student Population.* During the hearing I explained that New York City schools have been and continue to be affected by general demographic trends which have dramatically altered the racial/ethnic composition of the student population (p. 13). These demographic changes, which weer more elaborately examined in the supporting Affidavit of Irving Anker submitted at the Hearing (Anker Affidavit, pp. 2-3), are beyond the control of the Board of Education of the City of New York.

11. Despite the Board of Education's blameless inability to influence or curtail general population trends, it has

voluntarily adopted policies and practices designed to mitigate the impact of these trends on the New York City schools and improve the racial/ethnic student balance where opportunities for amelioration exist (p. 13; Anker Affidavit, pp. 4-6). These activities have consisted of, among other things, zoning for racial balance, open enrollment and stabilization plans (p. 13, Anker Affidavit, pp. 4-6).

12. In order for the racial/ethnic distribution of the teaching staff to mirror the racial/ethnic distribution of the student population, the Board would be forced to make massive and continuous shifts of its teaching staff at rates comparable to these demographic changes. Such drastic measures would not only detrimentally affect the continuity and educational effectiveness of programs in the school system but would abrogate existing rights of teaching personnel and violate state law.

13. Demographic trends in the population have resulted in a similar phenomenon occurring at the high school level. (p. 19, Anker Affidavit)

14. A particularly telling example of the impact of demographic trends in New York City High Schools arose at the Hearing in connection with a discussion of William Grady High School. (p. 34). That school's population has increased from about 1900 pupils in 1972 to 2124 in 1976. The non-minority student population has decreased over that same period from 1708 to 1627, while the Black student population has gone from 125 to 306. H.E.W.'s position that the racial/ethnic distribution of teaching staff must be congruent with the racial/ethnic composition of the student body, no matter how fluctuating, would necessitate a drama-

tic number of teacher transfers. Aside from the educational dislocations incidental to such movement of teachers, it abrogates the bona-fide color-blind seniority-based transfer rights of teachers, as well as the crucial factors of system wide attrition rates and individual vacancies and staffing problems of particular schools which are practical realities of operating a school system.

15. *State Law.* The 1969 amendments to the State Education Law restructured the New York City School System into 32 decentralized Community School Districts. (Article 52-A, Educ. L. §2590-E(2)). Section 2590-j of the amendments established an alternate teacher selection mechanism which permitted the appointment and assignment of teachers regardless of candidate ranking on eligible lists to schools where the reading level is below the 45 percentile of reading scores for the City School District. (Educ. L. §2590-j 5(b)). The Education Law was further amended to permit the appointment of persons who passed the National Teachers Examination (NTE) to teaching positions in 45 percentile schools. (Educ. L. §2590-J 5(C) and (C) (1). The Chancellor's affidavit, submitted at the Hearing, denominated the sundry purposes sought to be achieved by the amendments (Anker Affidavit pp. 7-9). At the Hearing I discussed perhaps the most important basis for the enactment of these amendments, that of facilitating permanent teacher appointments in difficult-to-staff schools. (pp. 14-18) Traditionally, because of crime, transportation problems, high student truancy, etc. these schools had to rely largely on substitute teachers to fill the teacher rosters, with attendant educational disadvantage. The amendments enlarged the pool of eligible teachers thereby enhancing the

opportunities for the selection and *permanent* appointment of teaching staff to schools. While it is true that the amendments were also designed to increase the pool of minority teachers, that pool was still *predominantly non-minority.* Thus, it was expected that these schools would achieve educationally desirable teacher staff stability and receive additionally some increased percentage of minority teachers. It was emphasized that the mandatory rank-order option had failed to produce that number of minority teachers comparable to the dramatic increase in the percentage of minority students or the minority population of New York City School District. Thus a policy designed to maintain established rank order candidate rights but at the same time create avenues for increased minority access into the teaching staff was necessary. These competing considerations evolved within the context of an, at that time, experimental decentralized school system. In such an interplay H.E.W.'s notion of "foreseeability" is largely hindsight.

16. *Consent Decree Program.* The consent decree in *Aspira of New York v. Board of Education, et al.,* 72 Civ. 4002, requires the New York City School System to implement a program of bilingual instruction for Spanish-Language dominant children. At the hearing, I explained to Dr. Goldberg that this program and other bilingual programs have resulted in some concentration of minority teachers, especially Hispanic, in schools where such programs are administered (p. 18; Anker Affidavit p. 10). In addition, an agreement signed on September 15, 1977, with the Office For Civil Rights of the Department of Health, Education and Welfare incorporates the basic concepts and

elements of the Consent Decree program but broadens the applicability of such services to non-Hispanic, non-English speaking students.

17. My explanations and observations on the racial/ethnic impact of these programs have been misconstrued by Dr. Goldberg in his determination of March 22, 1978. In his determination Dr. Goldberg states that "no evidence was provided to show that all or most of the Hispanic teachers assigned in the district have been placed in accordance with the so-called Aspira decree or any other recognized program, and such an explanation cannot account for the decree of racial, as well as ethnic seperation present here. (In fact, a majority of the qualified bilingual teachers are not Hispanic.)"

18. The testimony I gave at the Hearing and the supporting affidavits submitted at that time were not intended to show that all or even a majority of teachers in bilingual programs are Hispanic. Rather, a large percentage of the relatively small number of Hispanic Teachers are concentrated in bilingual programs either mandated by Aspira or provided under Title VII or ESL programs.

19. These explanations of Hispanic teachers concentration are consonant with the agreement of November 9, 1977 between the Board of Education and the Office For Civil Rights which provided for educationally-based program exceptions to the general requirements for teacher distribution. In fact, a letter writtten by David S. Tatel, Director of the Office For Civil Rights, dated December 30, 1977 to Robert Hermann, Puerto Rican Legal Defense and Education Fund, Inc. specifically states: "We believe that

effectuation of the *Aspira* decree would constitute an "educationally based program" exception. Indeed, as you are aware, OCR itself contemporaneously with the Memorandum of Understanding entered into a *Lau* agreement with the Board that builds upon the *Aspira* program."

20. At the hearing Dr. Goldberg did not challenge these educationally based program exceptions nor did he or his staff request additional data to demonstrate the degree of Hispanic teacher involvement in the Consent Decree programs.

21. *Contract Provisions.* Neutral date-of-hire collective bargaining agreement provisions govern the rights of teachers to transfer to existing vacancies within the school system and also determine teacher rights in instances where school(s) are forced to excess teaching personnel. (pp. 33, 35-36; Anker Affidavit p. 10; Supplemental Submission to Dr. Goldberg dated January 13, 1978). Despite the oral testimony and written evidence explaining these bona fide non-discriminatory seniority based transfer and excessing rights, which admittedly hamper the Board's integration efforts but are not discriminatory *per se,* Dr. Goldberg has determined that ". . . collective bargaining agreements or other volitional arrangements entered into by the school authorities may not excuse constitutionally forbidden segregation."

22. During the Hearing the New York City School District representatives were questioned regarding the lack of or low representation of minority teaching staff at various high schools, i.e., New Utrecht, Lafayette, James

Madison, Abraham Lincoln, Forest Hills, William E. Grady, James Adams, Francis Lewis, etc. (pp. 26-41).

23. The level of minority representation among the teaching staff at these schools is a function of several independent non-discriminatory factors such as attrition rates, vacancies, staff stability, transfer and excessing contractual rights, desirability of geographical locations, and availability of qualified minority teachers in specific license areas. (pp. 26-39; Anker affidavit pp. 18-19). Hard data to support this contention was submitted. (See Thomas affidavit).

24. Despite this evidence, the Carroll letter of January 12, 1978 and the Baxter letter of January 19, 1978, documenting the cumulative impact of these factors on the staffing of these high schools, Dr. Goldberg found them to be "unpersuasive." However, the plain facts which cannot be refuted is that Boys and Girls High School has 40 times the attrition rate of New Utrecht. In response Dr. Goldberg is nonetheless not persuaded. I can only infer that he does not dispute the fact as we allege them but rather is unpersuaded that forced transfer or some other unspecified defice, could not have been adopted. However, established teacher seniority rights prevented the Board from effecting the ethnic distribution of teachers in these schools which Dr. Goldberg seeks.

25. Moreover, in areas where it had flexibility and control the Board's affirmative steps improved the racial/ethnic balance of teachers throughout the system, for example, by a more stringent declination policy, limitation on hardship transfers and direct placements pursuant to the agreement

between the Board of Education and the Department of Health, Education and Welfare dated September 9, 1977. (pp. 44, 56; Thomas affidavit p. 4).

26. The Board's submissions at the Hearings also explained again the inappropriateness of H.E.W.'s previous findings with respect to our alternative high schools, i.e., Harlem, Park East, Harlem Prep, Lower East Side Prep, Satellite Academy, Pacific, Redirection and Auxiliary Services. (Anker affidavit p. 13-14). However, there was no specific findings with respect to these schools in H.E.W.'s post-hearing decision and we, thus, conclude that the District Court's analysis of the staffing there as consonant with ESAA has been accepted by H.E.W.

27. By letter dated March 22, 1978, Dr. Goldberg informed the Chancellor that he had concluded that the "City School District of the City of New York remains eligible for assistance under the Emergency School Aid Act for school year 1977-78," because:

> . . . On and before June 22, 1972, the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the requirements of the ESAA. We also determine that after June 23, 1972, the district took no effective steps to desegrate the system, which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments, which were segregative in intent, design or foreseeable effect."

Affidavit of Charles Schonhaut Dated 4/78

28. The record of the hearing, the supporting affidavits and other documents refute the determination of Dr. Goldberg that the New York City School System has maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964 or the requirements of the ESAA.

29. Quite the contrary, the record of the hearing conclusively proves that the racial/ethnic distribution of the New York City teaching staff has resulted from a complex matrix of non-discriminatory factors beyond the immediate control of the New York City Board of Education.

30. Of equal importance, the record demonstrates the commitment of the Board to solving extremely complicated social and educational problems by undertaking affirmative steps to improve the distribution of teachers of all races and ethnic backgrounds where legal opportunities to do so existed.

CHARLES SCHONHAUT
Charles Schonhaut

Sworn to before me
this ..... Day
of April, 1978

Transcript of Proceedings Before Weinstein, J.
Dated 4/12/78

Ms. Carroll: Assuming I will have something.

The Court: I struck out, as you may have noticed, the temporary restraining order in your papers.

Ms. Carroll: No, I didn't.

The Court: I did, and made it returnable today.

What I'm going to say applies to the Board of Education, and not to District 11.

I've carefully read all of the record that you submitted. Based on that reading of the record, it's my conclusion that the Board has had a fair hearing in accordance with my order. H.E.W. has determined that the school system is illegally segregated within the terms of the applicable Federal statutes. There are substantial grounds to support that finding. Under the circumstances, there's almost no possibility of the plaintiff's winning this suit. And injunction will have to be denied. Upon motion of the Government, the complaint will be dismissed.

Ms. Carroll: Can we have a stay of that order pending appeal?

The Court: You don't have an order. As soon as it's submitted.

Ms. Carroll: Fine.

The Court: Do you want to make a formal motion for summary judgment?

Mr. Caro: Yes, your Honor.

The Court: Make it.

Mr. Caro: We would like to move for summary judgment dismissing the complaint.

Transcript of Proceedings Before Weinstein, J.
Dated 4/12/78

The Court: Do you have anything else to offer but what you've offered?

Ms. Carroll: No, your Honor.

The Court: Motion granted. Submit an order. I'll give you a stay until next Tuesday at five o'clock so that you can go up to the Court of Appeals. That's the end.

Ms. Carroll: Thank you.

Mr. Caro: Thank you very much.

(Whereupon this matter was concluded.)

Amended Verified Complaint Dated 4/6/78

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 Civ. 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, IRVING ANKER, Chancellor of the City School District of the City of New York; COMMUNITY SCHOOL DISTRICTS 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29 and 30, 32,

Plaintiffs,

—against—

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare; DAVID S. TATEL, Office for Civil Rights, United States Department of Health, Education and Welfare,

Defendants.

AMENDED VERIFIED COMPLAINT

NATURE OF THE ACTION

1. This action seeks a declaration that the denial by the United States Department of Health, Education and Welfare of plaintiffs' applications for funds under the Emergency School Aid Act ("ESAA"), 20 U.S.C. §1601, *et seq.*, violates that Act and is arbitrary, capricious and illegal. Plaintiff seeks a preliminary injunction mandating defen-

dants to preserve and set aside for plaintiffs the sum of $3.5 million from 1977-78 ESAA appropriations, which funds have been initially earmarked for the plaintiffs and obligated and set aside for plaintiff Board of Education of the City School District of the City of New York (hereafter "Board") 1977-78 ESAA application by Memorandum and Order of this Court dated November 18, 1977, which funds would otherwise be disbursed to other school districts, and a permanent injunction against denial of plaintiff Board's 1977-78 ESAA application.

JURISDICTION

2. This court has jurisdiction of this action under:

(a) 28 U.S.C. §1331 in that this action arises under Title VII of the Civil Rights Act, §§701-720, 20 U.S.C. §1601-19, and the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs,

(b) 5 U.S.C. §702 in that this action challenges as arbitrary and capricious administrative action denying plaintiffs' application for funding under ESAA, and

(c) 28 U.S.C. §1361 in that the action seeks to compel the performance by federal officials of a duty mandated by law.

3. Declaratory relief is appropriate pursuant to 28 U.S.C. §2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

VENUE

4. Venue is properly placed in this district pursuant to 28 U.S.C. §1391(e).

PARTIES

5. Plaintiff Board of Education of the City School District of the City of New York ("Board") is authorized pursuant to New York Education Law to operate the public school system in the New York City School District. It is a local educational agency under ESAA eligible to submit applications for funds to finance special educational programs and projects.

6. Plaintiff Irving Anker is the Chancellor and, pursuant to New York Education Law § 2590-h, the Chief Executive Officer of the New York City School District.

7. Community School Boards, 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29, 30 and 32 established by Article 52-A (§§2590, et seq. of the New York Education Law), are local educational agencies eligible to submit applications for funding under ESAA.

8. Defendant Joseph Califano is the Secretary of the Department of Health, Education and Welfare ("HEW") and as such is charged with responsibility for supervision and final review of applications for funding under ESAA.

9. Defendant Herman R. Goldberg is the Associate Commissioner, Equal Educational Opportunity Programs, HEW. He is charged with the duty of reviewing applications for ESAA funding and preliminarily determining applicant eligibility.

10. Defendant David S. Tatel is the Director of the Office of Civil Rights, HEW, and is charged with super-

visory responsibility of civil rights compliance investigations and review of applicant requests for waivers of ineligibility.

STATEMENT OF CLAIM

11. In 1972, Congress passed ESAA to provide funds to local education agencies for a variety of programs and projects to eliminate or prevent minority group isolation and to improve the quality of education for all children.

12. On or about January 14, 1977, plaintiff Board submitted an application for ESAA funding to defendant Califano through the Regional Office of the Office of Education, HEW.

13. These applications sought ESAA funds to administer basic, pilot and bilingual programs in the public schools of the City of New York for the 1977-78 school year in Districts 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 25, 26, 28, 29, 30 and 32 and in the high schools and special educational programs administered by the Board.

14. On April 14, 1977, upon the instruction of HEW staff, the Board submitted a revised application to defendant Califano.

15. The programs contained in the ESAA applications are specifically designed to foster integration and reduce minority student isolation by providing services to 40,000 students in the New York City Schoool District.

16. HEW officials informed plaintiffs that the educational projects and programs described in the April, 1977

ESAA applications met all HEW programmatic and fiscal requirements and that the applications were approved as to content and amount, subject only to a determination that no other legal impediment to funding existed.

17. By this action, ESAA funds of approximately $17.5 million were tentatively approved and set aside by defendants for the programs and projects of plaintiffs.

18. On or about July 1, 1977, defendant Goldberg advised plaintiffs (by letter) that ESAA funding would be denied to the New York City School District for the 1977-78 school term.

19. The denials were based upon conclusions arrived at by the Office for Civil Rights ("OCR") after an investigation of civil rights compliance in the New York City School District under Title VI of the Civil Rights Act of 1964.

20. That investigation resulted in a report dated November 9, 1976, specifying areas of alleged noncompliance with the provisions of Title VI of the Civil Rights Act of 1964.

21. In a report dated April 22, 1977, the Board denied the existence of any discriminatory practice and submitted data rebutting the conclusions of OCR.

22. Although HEW's letters sent to plaintiffs on or about July 1, 1977 cited other grounds for denial of plaintiffs' ESAA applications, upon subsequent consideration HEW advised plaintiffs that ESAA funds would be denied

to plaintiffs solely on the ground of alleged discrimination in assignment of teachers in the public schools .

23. The purported basis for the finding was OCR statistics allegedly reflecting 1) low system-wide minority teacher hire rate in the New York City School District and 2) a higher incidence of minority teachers in some schools with high minority student populations and a higher incidence of non-minority teachers in some schools with higher non-minority student populations.

24. The notices of denial advised plaintiffs that they were permitted to seek an opportunity to show cause before defendant Goldberg why the determinations of ineligibility should be revoked pursuant to 45 CFR §185.46.

25. Plaintiffs' timely requests for an opportunity to show cause were granted by defendant Goldberg. The show cause proceedings were held over a period of three weeks in July 1977.

26. Both in its ESAA application and at the Show Cause proceeding, plaintiffs established that it has had and continues to have a policy of non-discrimination and that schools were and are not identified as intended for students of a particular race, color or national origin.

27. That administrative record demonstrated that current minority and non-minority student and teacher population patterns primarily resulted from and were affected by State law; demographic changes in the student population of the City schools; collective bargaining agreements' neutral, date-of-hire seniority practices; minority incidence

in the relevant available work force; incidence and distribution of vacancies in specific teacher license areas. These factors are described more fully below:

A. *State Law—*

All teacher appointments and assignments in New York City public schools until 1970 were made pursuant to the provisions of Education Law §2569 and §2573. Under that statutory scheme, upon the Chancellor's request (Educ. L. §2573 (2)), the Board of Examiners conducted competitive examinations for pedagogical licenses and promulgated lists of candidates ranked in order of performance on the examinations (Educ. L. 2569), which eligible lists were then certified to the plaintiffs for appointment and assignment of teachers in rank order (Educ. L. §2573 (10-a)).

The Education Law also permitted assignment of persons with substitute license where there are an insufficient number of regularly licensed teachers to fill vacancies. Eligible lists have at no time described or identified the national origin or race of candidates for pedagogical assignment.

B. *Amendments to Education Law*

While the above statutory pattern continues to be applicable in a variety of situations, a new method for teacher appointment and assignment for a substantial number of schools within the New York City school district was created by the 1969 amendments to the Education Law designed, in part, to achieve affirmative action goals in teacher hiring. Effective September 1969, the New York City School System was restructured into 32 decentralized

Community School Districts which, subject to the powers retained by the Central Board and the Chancellor, were authorized to appoint and assign teachers. Educ. L. §2590-e (2).

As part of this new decentralization law Education Law §2590-j(5) provided the following three alternative methods of teacher appointment and assignment in schools within community school districts where the reading level is below the 45 percentile of reading scores for the City School District. Such appointments in such schools may now be made from (1) eligible lists regardless of candidate ranking, (2) the National Teachers Examination, a qualifying (i.e., non-ranked), rather than a competitive examination administered nationally by the Education Testing Service, or (3) lists resulting from qualifying examinations prepared and administered by the Board of Examiners. These amendments to the Education Law were enacted to (1) equalize reading achievement levels, (2) increase the number of minority teachers employed in the New York public School system; (3) eliminate overutilization of substitute licensed teachers, and (4) maximize community control-based solutions to educational problems.

Revisions of the New York Education Law were based on these factors: (a) City public school student population had dramatically changed from predominantly non-minority to predominantly minority (see D below); (b) the percentage of minority teachers (7%—1969), though conconant with the percentage of minority individuals in the relevant available work force (5% of college graduates in the United State and the New York Metropolitan area), was relatively static and disproportionate to the continu-

ally increasing minority student population; (c) low reading achievement, particularly among minority students, fostered a developing educational consensus that minority teacher role-model theories should be explored, at least experimentally, in schools where low reading levels warrant new educational approaches; (d) minority teacher hire rates increased in school districts where NTE and qualifying, rather than competitive examinations for teacher selection, had been utilized experimentally; (e) an overdependence on substitute licenses was developing in various school districts, particularly those with high concentrations of minority students.

C. *Ethnic Hiring Levels Attributable to State Law Amendments*

Teacher hires during the period 1970-71 through 1974-75 reflect that the purpose of the amendments to the Education Law, that of increasing minority teacher hires, was substantially realized. For Blacks the percentage change was + 15.2%, for Hispanics, + 112.6%. The percentage of minority teachers rose from 7% in 1969 to 15% in 1976.

D. *Demographic Changes.*

In 1957, the student population of the New York City School District was 68.3% non-minority; in 1975, 32.1% non-minority. During the same period the non-minority population of New York City decreased by 702,699, while the minority population increased by 815,566.

Housing patterns in virtually all boroughs of the City of New York reflected such large concentrations of minority and non-minority groups that zoning of school feeder patterns to achieve racial balance became increasingly diffi-

cult during the 1960's. To improve racial balance notwithstanding all these factors, the Board devised various zoning strategies, such as choice of admissions, paired schools, and scrutiny of school site selection.

E. *Contractual Provisions and Court Orders*

Teacher assignments reflect date-of-hire seniority under provisions of the collective bargaining agreement between the Board of Education and the United Federation of Teachers which provide that vacancies as they arise, must be offered in the first instance to teachers with the greatest length of service. Also vacancies in specific licenses must, where possible, be filled by persons in license. Thus, the number of minority and non-minority persons possessing licenses and the number of vacancies in a particular license area determine the incidence and distribution of teachers in the school system.

Implementation of the consent decree in *Aspira of New York, Inc. v. Board of Education,* 72 Civ 2004 (S.D.N.Y. August 29, 1974), requiring the provision of bilingual instruction to Spanish-dominant children resulted in the concentration of Hispanic teachers in schools with high Hispanic student populations.

Under a newly developed teacher recall plan for fall 1977, assignments of teachers will be made so as to further racial balance of teaching staffs in all schools, not inconsistent with the consent decree. Recalled teachers are not subject to the contractual provisions referred to above in the first paragraph of paragraph 27E.

28. No evidence was introduced at the show cause proceedings to refute plaintiffs' submission as summarized in

paragraph 27 of this Complaint. In particular, there was no evidence establishing or even suggesting that teacher appoinntments from competitive eligible lists violated the neutral, statutcry rank order scheme. Nor did the OCR Report contain any finding that teacher appointments made from eligible lists violated the statutory scheme for rank order appointments.

29. Moreover, neither teacher appointments or assignments in the New York City School System are made in a manner intended to discriminate against minority children or minority teachers and there has been no judicial finding to the contrary.

30. In *Rubinos v. Board of Examiners,* 74 Civ. 2240 (S.D.N.Y.), a Title VII challenge to methods of teacher selection employed in the New York City public schools, the District Court denied an application for a preliminary injunction enjoining the use of eligible lists derived from teacher license examinations on grounds of racial discrimination.

31. Despite the evidence introduced at the show cause proceeding (¶ 27 of this complaint) and the absence of controverting evidence, defendants have rejected plaintiffs' applications by letters received on or about September 19, 1977.

32. Plaintiffs have exhausted all administrative remedies provided under 20 U.S.C. § 1601-19 and 45 C.F.R. 185.00 *et seq.*

33. Pursuant to 20 U.S.C. §1605d(1)(5), plaintiffs may seek a "waiver of ineligibility" by demonstrating compli-

ance with the remedy in 45 C.F.R. §185.44(d)(3). This is not a mechanism for appealing the final determination of ineligibility. Rather, it is a procedure for securing a waiver of that final determination by showing compliance with the remedy ordered by HEW.

34. Unless the relief requested in this action is granted, plaintiffs will suffer immediate and irreparable injury as a result of defendants' action. Plaintiffs do not have an adequate remedy at law.

35. Defendant Goldberg has advised plaintiff Anker that the ESAA funds set aside for the plaintiffs' application will be held no later than September 30, 1977. Thereafter, the funds will be disbursed to other applicants unless the preliminary relief requested by plaintiffs to preserve the status quo is granted.

36. Plaintiffs have recently been advised that even were the findings of ineligibility reversed after the commencement of the September 1977 school year and before September 30, 1977, the ESAA funds that would otherwise have been available for that period of time (preceding receipt of notice of revocation of ineligibility) would be lost to plaintiffs.

37. Thus, under defendants' interpretation, for every day that goes by without issuance of an award letter for ESAA, plaintiffs lose that day's portion of the ESAA funding.

38. On or about September 7, 1977, plaintiffs and defendants resolved the issue of ethnic staff distribution in the City School System by a Memorandum of Agreement providing for implementation over three years of a program designed to achieve greater racial balance in staffing. The parties have agreed that the Memorandum constitutes compliance with all applicable Title VI standards (See ¶ 19 of this Complaint).

FIRST CAUSE OF ACTION

39. On or about September 23, 1977, plaintiffs commenced an action seeking a preliminary and permanent injunction against HEW's threatened denial of 1977-78 ESAA funding.

40. On that date, a temporary restraining order was issued by the Court preventing defendants from distributing those $3.5 million in ESAA funds preliminarily earmarked for the Board's 1977-78 ESAA application.

41. Following submission of pleadings by the parties and oral argument the Court issued a memorandum decision and order remanding the issue of the Board's and District 11's 1977-78 ESAA applications to HEW for a *de novo* hearing consistent with the due process principles enunciated therein.

42. On January 5, 1978, a hearing was had before defendant Goldberg on the issue of the Board's eligibility for 1977-78 ESAA funding.

43. At that hearing the purported grounds for HEW's denial of ESAA eligibility as charged in Dr. Goldberg's

July 1, 1977 letter to Chancellor Anker were the subject of oral testimony and documentary submissions.

44. At that hearing, the Board proved that the assignment of teachers in the New York City School District resulted from and was affected by neutral, non-discriminatory factors and not any policy practice or procedure which identifies schools as intended for students of a particular race, color or national origin.

45. On March 22, 1978, HEW rendered a decision following the remand hearing and held that the Board was ineligible for 1977-78 ESAA funding.

46. HEW's prior decision following the original show cause proceeding was that the Board violated ESAA and the regulations promulgated thereunder, specifically 45 C.F.R. § 185.43(b)(2) by having in effect, *after* June 23, 1972, a practice policy or procedure which resulted in discrimination on the basis of race, color or national origin in the assignment of teachers to schools in such a manner as to identify such schools as intended for students of a particular race, color or national origin.

47. HEW's decision following the corrective show cause proceeding was as follows:

> "We hereby determine, as required by the Court, that on and before June 23, 1972 the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the 14th Amendment to the United States Constitution, Title

> VI of the Civil Rights Act of 1964 and the requirements of the ESAA. We also determine that after June 23, 1972 the district took no effective steps to desegregate the system which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments which were segregated in intent design or foreseeable effect."

48. At the corrective show cause proceeding the HEW, for the first time, indicated that a purported basis for finding the Board was pre- rather than post-September 23, 1972 practices, policies and procedures which resulted in discrimination on the basis of race, color or national origin, in the assignment of teachers.

49. HEW has no ethnic documentation or data on distribution of teachers in the New York City School District for the period prior to September 23, 1972.

50. By a decision issued on March 15, 1978, in *William Caulfield, et al. v. Board of Education, et al.*, 72-C-2155, this Court permanently enjoined enforcement of the Memorandum of Agreement dated September 7, 1977 (See ¶38 of tihs Complaint) pending a public hearing before HEW on the issues involved therein.

FIRST CAUSE OF ACTION

51. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-38 herein.

52. Defendants applied an erroneous standard and violated 20 U.S.C. §1601-12 and 45 CFR §185.00 *et seq.* in denying plaintiffs' application for ESAA funding.

53. 20 U.S.C. §1605(d)(1)(B) provides that "no educational agency shall be eligible for assistance . . . if it has, after June 23, 1972, . . . engaged in discrimination based upon race, color or national origin in the hiring, promotion, or assignment of employees in the agency . . ."

54. Promulgated under 20 U.S.C. §1605(d)(1)(B) is 45 CFR §185.43(b)(2), upon which defendants assert plaintiffs' ineligibility for funding. That section provides, in pertinent part, that "no educational agency shall be eligible for assistance under the Act, if after June 23, 1972, it has had or maintained in effect any practice, policy or procedure which results in discrimination on the basis of race, color or national origin in the . . . assignment of any of its employees . . . including the assignment of full-time classroom teachers to schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin."

55. Defendants have construed 45 CFR §185.43(b)(2) to require the denial of ESAA funding merely because of a disparate incidence or distribution of minority teachers, notwithstanding the absence of any proof of discrimination by a grant applicant.

56. This result-oriented construction is erroneous. It is inconsistent with 20 U.S.C. 1605(d)(1)(B) and misconstrues the regulations in that it creates an irrebuttable presumption that disparate ethnic statistics of teacher incidence and distribution, per se, constitute discrimination in teacher assignment violative of ESAA.

57. Disparate impact evidenced by statistical data is not tantamount to discrimination under 20 U.S.C. § 1605(d)(1)(B) or 45 CFR §185.43(b)(2).

58. Under 20 U.S.C. §1605(d)(1)(D) and 45 CFR § 185.43(b)(2) evidence showing that a disparity results frim neutral factors and not from a discriminatory purpose or plan must be considered by HEW in determining whether the assignment and hiring pattern observed bars eligibility for ESAA funding.

59. Defendant Goldberg applied an improper legal standard and violated 20 U.S.C. § 1605(d)(1)(D) and 45 CFR § 185.43(b)(2) in refusing to consider plaintiffs' evidence concerning the non-discriminatory factors which affected and resulted in the present numbers and patterns of teacher assignment.

SECOND CAUSE OF ACTION

60. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-38 and 40-47 herein.

61. There was no proof whatsoever in the administrative record that an intent or purpose to discriminate against minorities was involved in the hiring or assignment of teachers in New York City public schools.

62. Under 20 U.S.C. § 1605 (d) (1) (B) and 45 C.F.R. § 185.43 (b) (2) there must be proof of an intent or purpose to discriminate against minorities in the hiring and assignment of teachers to support a finding of ineligibility for ESAA funding.

63. In the absence of proof of intent or purpose to discriminate, defendants' finding of plaintiffs' ineligibility for ESAA funding violates 20 U.S.C. § 1605 d 1 (B) and 45 C.F.R. § 185.43(b)(2).

THIRD CAUSE OF ACTION

64. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-38, 40-47, 49-51 herein.

65. The evidence submitted to defendants in support of plaintiffs' 1977-78 ESAA application entitled plaintiffs to immediate funding.

66. No practice, policy or procedure of teacher assignment intended to discriminate by identifying schools as intended for students of a particular race, color or national origin was established by the evidence submitted to and reviewed by HEW in connection with plaintiffs' 1977-78 ESAA applications.

67. Defendants have found plaintiffs' applications to satisfy all programmatic and fiscal requirements for ESAA funding.

68. Defendants have no legally sufficient basis for withholding ESAA funds and are required by law to grant those funds to plaintiffs, having found their applications for funding to be otherwise sufficient.

FOURTH CAUSE OF ACTION:

69. Plaintiffs repeat and reallege each and every allegation set forth in paragraph 1-38, 40-47, 49-51, and 53-56.

70. Defendants' action denying plaintiffs' applications for ESAA funding is arbitrary, capricious and illegal and violates 5 U.S.C. §702 in that evidence showed that the ethnic incidence and distribution of teachers in the public schools did not result from a pattern or practice of discrimination.

71. The decision to deny funding based on an insufficient evidentiary basis is illegal and an abuse of discretion.

FIFTH CAUSE OF ACTION:

72. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-50, 51-59, 61-63, 65-67, and 69-70.

73. Defendants' action denying plaintiffs' application for ESAA funding is arbitrary, capricious and illegal and violates 5 U.S.C. 6-02 in that it articulates no rational basis for rejection of plaintiffs' evidence that the distribution of teachers in the City School District resulted from and was affected by neutral non-discriminatory factors.

74. Moreover, summary rejection of that evidence is error of law in that it misconstrues the legal standards for discrimination under the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Enter a declaratory judgment that the defendants' denial of plaintiffs' 1977-78 applications for ESAA funding (1) is based upon an erroneous standard of law and violates 20 U.S.C. §§ 1601-1619, 45 CFR § 185.43(b)(2) and

5 USC § 702 is that it is arbitrary and capricious, and (2) is unlawful and improper because there is no evidence of a pattern or practice of discrimination in teacher assignment in New York City which bars an award of ESAA funding to plaintiffs nor any rational basis for the rejection of plaintiffs' ESAA application.

(b) Enter a preliminary and permanent injunction mandating that defendants preserve and set aside a fund of $3.5 million for plaintiffs' 1977-78 ESAA application and to award such fund to plaintiffs.

(c) Enter an order awarding plaintiffs their costs and disbursements herein.

(d) Grant such other and further relief as this Court deems proper.

Dated: New York, N. Y.
April 6, 1978

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Plaintiffs
Municipal Building
1 Centre Street, Room 1645
New York, N. Y. 10007
(212) 566-2183/2192

By .....
Rosemary Carroll
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK
COUNTY OF KINGS, *ss.*:

IRVING ANKER, being duly sworn, deposes and says that he is the Chancellor of the City School District of the City of New York; that he has read the foregoing Complaint and knows the contents thereof to be true; and that the source of his information and the basis for his belief is the books and records of the Board of Education of the City School District of the City of New York.

.....
Irving Anker

Sworn to before me this
10th day of April, 1978

Order of Weinstein, J. Dated 4/18/78

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 77 C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; IRVING ANKER, Chancellor of the City School District of the City of New York; COMMUNITY SCHOOL BOARDS OF COMMUNITY SCHOOL DISTRICTS 1, 7, 9, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29, 30 and 32,

Plaintiffs,

—against—

JOSEPH CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare; HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare; DAVID S. TATEL, Office for Civil Rights, United States Department of Health, Education and Welfare,

Defendants.

ORDER APPEALED FROM

Upon the application of the Board of Education of the City School District of the City of New York and the other plaintiffs, except Community School Board of Community School District 11, for an order pursuant to Rules 56 and 65, Fed. R. Civ. P., (a) rescinding defendants' denial of plaintiffs' application for funding under the Emergency School Aid Act (ESAA), 28 U.S.C. §§1601-1619, and declar-

ing such denial to be violative of that act and of regulations promulgated thereunder, 45 CFR §185.01, *et seq.*, (b) declaring said denial arbitrary and capricious and violative of 5 U.S.C. §702, *et seq.*, (c) restraining defendants as authorized by 5 U.S.C. §705, from disbursing any and all funds in the amount of $3,500,000.00 now earmarked and previously ordered to be set aside and obligated for the ESAA application of plaintiff, Board of Education of the City of New York ("Board of Education") pursuant to this Court's Memorandum and Order of November 18, 1977 and ordering defendants to retain such funding in escrow for the use and credit of the Board of Education pending the determination of this action, and (d) further granting plaintiffs judgment, awarding such to plaintiffs pursuant to its application therefor, and (e) further awarding plaintiffs costs, upon the consideration of affidavits and exhibits submitted in support of plaintiffs' aforesaid application, upon the administrative record, amended verified complaint and all other papers and proceedings heretofore had herein, and upon defendants' cross-motion for judgment, pursuant to Rules 12(b), 12(c) and 56, Fed. R. Civ. P., affirming defendants' decision as supported by substantial evidence in the administrative record and dismissing the complaint, and the plaintiffs having appeared by Allen G. Schwartz, Corporation Counsel, Rosemary Carroll, Assistant Corporation Counsel, and the defendants having appeared by David G. Trager, United States Attorney for the Eastern District of New York, by Richard P. Caro, Assistant United States Attorney, of counsel, and a hearing having been held before this Court on April 12, 1978, and argument having been heard, it is hereby

ORDERED that plaintiffs' application for a temporary restraining order and for judgment reversing defendants' decision finding plaintiffs ineligible for ESAA funds, and other relief, is denied in all respects, and it is further

ORDERED that defendants' motion for judgment affirming the Secretary's determination that the aforesaid plaintiffs, except Community School Board of Community School District 11, are ineligible for ESAA funding for the 1977-78 school year as supported by substantial evidence in the administrative record and dismissing the complaint is granted, and it is further

ORDERED that District 11's eligibility for ESAA funding is not determined by this Order, and it is further

ORDERED that a stay of this Order is granted until 5:00 p.m., April 21, 1978, pending plaintiffs' filing of a Notice of Appeal and motion for an extension of this stay by the Second Circuit Court of Appeals and that pursuant to this stay, HEW is restrained from taking any action whatsoever to distribute, award or allocate the $3.5 million preliminarily set aside and obligated for plaintiffs' 1977-78 ESAA application, and it is further

ORDERED that it is hereby determined that there is no just reason for delay for entry of a final judgment against the moving plaintiffs and that accordingly, pursuant to Rule 54(b), Fed. R. Civ. P., the Clerk of this Court is hereby directed to enter final judgment against all the

plaintiffs, except with respect to the plaintiff, Community School Board of Community School District 11, without costs or disbursements.

Dated: Brooklyn, New York
April 18, 1978

JACK B. WEINSTEIN,
United States District Judge

Letter to Joseph F. Bruno Dated 2/20/79

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 20, 1979

Joseph F. Bruno, Esq.
Assistant Corporation Counsel
100 Church Street
New York, N. Y. 10007

RE: Board of Education of the City School District of the City of New York, et al. v. Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, et al., No. 78-873

Dear Mr. Bruno:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the rules.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ JUNE M. HOFFMANN
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures